2003

State of Utah v. Troy Rees : Brief of Petitioner

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Petitioner/Appellee	:	Case No. 20030208-SC
v.	:	
TROY REES,	:	
Respondent/Appellant	:	

BRIEF OF PETITIONER STATE OF UTAH

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This Court granted certiorari to review the Utah Court of Appeals' decision in *State v. Rees*, 2003 UT App 4, 63 P.3d 120 (addendum A), which reversed the district court's denial of Rees's petition for extraordinary relief. This Court has jurisdiction pursuant to Utah Code Annotated § 78-2-2(3)(a) (Supp. 2001) & UTAH CODE ANN. § 78-2a-4 (1986).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

Issue 1: Did the Court of Appeals err by resurrecting the ancient common law writ of error *coram nobis* when a clear statutory remedy is available to Rees under the Post-Conviction Remedies Act?

Standard of Review: On certiorari review, this Court reviews the decision of the court of appeals, not the trial court, for correctness and without deference to its conclusions of law. *State v. James*, 2000 UT 80, ¶ 8, 13 P.3d 576 (citations omitted). "The correctness of the court of appeals' decision turns on whether that court accurately reviewed the trial court's decision under the appropriate standard of review." *Id.*

Issue II: Did the Court of Appeals err in reversing the trial court's decision to dismiss the petition for extraordinary relief?

Standard of Review: Same as above.

Issue III. Did the Court of Appeals err by ruling that Rees may be entitled to a second direct appeal from the same final judgment?

Standard of Review: This is an issue of law which should be reviewed for correctness. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following relevant statutes and rules are set forth in full in addendum B:

The Post-Conviction Remedies Act, UTAH CODE ANN. § 78-35a-101 et seq. (1996);
Utah Rule of Civil Procedure 65C (1996);
Utah Rule of Civil Procedure 65B (1996);
Former Utah Rule of Civil Procedure 65B(b) (1977).

STATEMENT OF THE CASE

On February 4, 1999, Rees was charged with possession of marijuana with intent to distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (1998 & Supp. 2000) (R. 1). Rees moved to suppress evidence seized pursuant to a warrantless

search of his trailer home (R. 26). The trial court denied Rees's motion and found Rees guilty as charged (R. 104:2-7). The court imposed a 0-5 year prison term, which was suspended in lieu of a 3-year probationary term (R. 86). Rees timely appealed (R. 95).

On appeal, Rees was represented by trial counsel. Counsel failed to include the preliminary hearing transcript, the suppression hearing transcript, and the affidavit in support of the search warrant in the record on appeal. Absent an adequate record, the court of appeals could not address the issues raised and presumed the correctness of the disposition made by the trial court. Rees's conviction was affirmed. *See State v. Rees*, 2001 UT App. 27 (unpublished memorandum decision) (Feb. 1, 2001) (addendum C).

On April 12, 2001, Rees, still represented by the same counsel, filed a motion for re-sentencing in the underlying criminal case (R. 112-114). Rees stated that the purpose of the motion was to allow him to re-file his appeal (R. 112). On May 9, 2001, one day before the scheduled hearing, Rees apparently realized that a motion to re-sentence was not the appropriate way to seek relief. He then filed a petition for extraordinary relief (R. 121-123). However, the petition was filed in the original criminal case, no. 991900480, instead of as a separate civil action (R. 121-123, addendum D). The petition did not raise any claim of ineffective assistance of appellate counsel. The petition stated:

> The reason for requesting extraordinary relief is that the Defendant's appeal was denied for the failure of certain transcripts having not been filed with the Court of Appeals. These transcripts had been timely ordered, paid for and were on file with the Clerk of the District Court but were not filed with the rest of the record. This was through no fault of the Defendant/ Petitioner, but the Defendant/Petitioner is restrained by the 45 day jail sentence pending if he is not granted the relief requested herein.

(R. 121). The relief Rees requested was that he be re-sentenced and allowed to file a second appeal (R. 123).

On May 10, 2001, the trial court dismissed the petition. In its minute entry, the court said: "This is time [sic] set for motion hearing on the motion for extraordinary relief. Hearing not held. State[1] objects to the motion filed as the case has already been adjudicated in the Court of Appeals. Court dismisses the petition and finds that the case has been adjudicated in the Court of Appeals" (R. 128)(addendum E).

Rees appealed the trial court's dismissal of his petition. On appeal, Rees stated that "[t]he issue before this Court if [sic] the Trial Court committed err [sic] in not considering the defendant's lack of fault in a procedural defect in the appeal process." (addendum F). Again, Rees did not raise any claim of ineffective assistance of counsel.

On appeal, the State filed a motion for summary disposition requesting that the court of appeals reverse and remand to the district court, so that the matter could be properly filed as a civil petition for post-conviction relief, pursuant to The Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 et. seq. and Utah R. Civ. P. 65C, and the Attorney General could respond to the petition at the district court level. The court of appeals denied the

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[1] A prosecutor was present on May 10, but no one from the Attorney General's office was present. "If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General." Utah R. Civ. P. 65C(h). The Attorney General was not notified that a petition had been filed, was not asked to respond, was not present when the petition was dismissed, and was not notified that the petition had been dismissed.

State's motion for summary disposition. *State v. Rees*, No. 20010490-CA (Utah App. March 25, 2002).

Instead, the court of appeals, without oral argument, reversed on a ground that was never asserted or briefed on any level. The court of appeals found that "while Rees's petition for extraordinary relief fails to articulate a clear or concise claim, our reading of the petition suggests that the petition is predicated on a claim of ineffective assistance of appellate counsel." *State v. Rees*, 2003 UT App 4, ¶ 8, 63 P.3d 120. The court of appeals then resorted to an ancient common law writ, concluding that "Rees's petition for extraordinary relief is best described as rooted in the ancient writ of error coram nobis" *Id.* The court of appeals reversed and remanded to the district court, with the additional instruction that "should Rees prevail, the trial court's authority is limited to merely re-sentencing Rees nunc-pro-tunc." *Id.* at ¶ 16.

STATEMENT OF THE FACTS

The facts essential to this petition are included in the statement of the case. The facts of the underlying criminal conviction, taken from the State's brief in the direct appeal (case no. 991078-CA), are included for the information of the Court as addendum G. Those facts are stated in the light most favorable to the bench verdict. *See Johnson v. Higley*, 1999 UT App 278, ¶2, 989 P.2d 61, 61 (bench trial).

SUMMARY OF THE ARGUMENT

The court of appeals improperly reversed the district court decision without oral argument on a ground that was not briefed, and that was never raised by Rees. In reversing

the district court's denial of the petition for extraordinary relief, the court of appeals erred by resorting to use of the common law writ of error coram nobis, thereby circumventing the appropriate statutory avenue for relief available under the Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 et seq., and Utah Rule of Civil Procedure 65C. The court of appeals' decision departs from the accepted and usual course of judicial proceedings and conflicts with decisions of this Court.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY RESORTING TO THE COMMON LAW WRIT OF ERROR CORAM NOBIS, WHEN A CLEAR STATUTORY REMEDY EXISTS UNDER THE POST-CONVICTION REMEDIES ACT.

On appeal, it is appellant's burden to ensure that a complete record has been provided. Utah R. App. P. 11. Absent an adequate record, "defendant's assignment of error stands as a unilateral allegation which the review court has no power to determine." *Rudolph v. Galetka*, 2002 UT 7, ¶ 8, 43 P.3d 467 (quoting *State v. Wulffenstein*, 657 P.2d 289, 293, *cert. denied*, 460 U.S. 1044, 103 S.Ct. 1443 (1982)). Where the record is inadequate, the appellate court will assume the regularity of the underlying proceeding. *State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92.

Rees's appellate counsel performed deficiently by failing to ensure that necessary parts of the trial record were made part of the record on appeal.[2] Consequently, the court

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[2] The State concedes that counsel on appeal performed deficiently but does not concede that Rees can meet the prejudice prong of the test in order to establish ineffective assistance of appellate counsel.

of appeals affirmed Rees's conviction. Rees had a clear-cut legal avenue to seek relief: a civil petition for post-conviction relief pursuant to the Post-Conviction Remedies Act and Utah Rule of Civil Procedure 65C. The Post-Conviction Remedies Act specifically provides that a petitioner may file a new, civil action seeking relief on the ground that "the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution." Utah Code Ann. § 78-35a-104(1)(d)(1996).

Rather than pursue this available remedy, counsel for Rees committed two missteps. First, he improperly filed a petition for extraordinary relief in the underlying criminal case, rather than as an independent civil action under the Post-Conviction Remedies Act. Second, he failed to assert a claim of ineffective assistance of appellate counsel. In view of these omissions, the district court properly dismissed the petition.

As a consequence of counsel's choices, Rees's appellate claims were not reviewed on the merits. In an apparent attempt to afford Rees the review his counsel had failed to obtain, the court of appeals ignored the only appropriate avenue of relief - the Post-Conviction Remedies Act - and instead resorted, not merely to a common law remedy, but to an ancient writ the Post-Conviction Remedies Act was expressly designed to supersede. This was error.

A. The proper avenue for seeking relief is under the Post-Conviction Remedies Act.

The ancient writ of error coram nobis was a common-law device designed to allow a trial court to review an error of fact. *Huffman v. Alexander*, 197 Or. 283, 293, 253 P.2d

289, 340 (Oregon 1953). "While the writ is recognized as an existing common-law remedy in some jurisdictions, it is almost obsolete.[3] " *Huffman*, 253 P.2d at 340, citing 24 C.J.S., Criminal Law, § 1606, p. 144; *and see* 31 Am.Jur., Judgments, §§ 798-812. In some jurisdictions, including Utah, "post-conviction statutes have been passed which take the place of all proceedings in the nature of coram nobis and which eliminate much of the uncertainty as to the scope of that remedy." *Huffman*, 253 P.2d at 341.

The common law writ of error coram nobis is limited to an error of fact for which the Legislature has provided no remedy. *State v. Gee*, 30 Utah 2d 148, 150, 514 P.2d 809, 811 (Utah 1973). Utah's Post-Conviction Remedies Act provides a remedy. It is the appropriate avenue for seeking relief when a defendant claims that he "had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution." Utah Code Ann. § 78-35a-104(1)(d).

More than a hundred years ago, when the common law writ of error coram nobis was in general use, there was no remedy by appeal, or by motion for a new trial, [or by a petition for post-conviction relief]. *See State v. Gee*, 30 Utah 2d 148, 150, 514 P.2d 809, 810 (Utah 1973); and *Huffman v. Alexander*, 197 Or. 283, 293, 253 P.2d 289, 341 (1953). "Subsequently these remedies came into existence by statutory enactment and supplanted

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[3] Common law writs such as the writ of error coram nobis fell into disuse in Utah, and most other states, as early as 1895. *See Elliott v. Bastian*, 40 P.713 (Terr. of Utah 1895) ("these writs have fallen into desuetude in most of the states); *Sullivan v. Turner*, 22 Utah 2d 85, 448 P.2d 907 (Utah 1968) (writ of error coram nobis is available in a proper case, but "its use is even more rare and restricted than that of habeas corpus").

much of the former scope of the writ." *Gee*, 514 P.2d at 810. Use of a petition for writ of error coram nobis became very uncommon. "Coram nobis is a limited remedy of narrow scope and is available, where no other remedy exists . . ." *Lopez v Shulsen*, 716 P.2d 787, 788, n. 1 (Utah 1986).

Previously in Utah, a petitioner seeking certain kinds of post-conviction relief could have filed a petition for writ of habeas corpus or a petition for writ of error coram nobis. *See Sullivan v Turner*, 22 Utah 2d 85, 448 P.2d 907 (1968); *Ward v. Turner*, 12 Utah 2d 310, 366 P.2d 72 (1961); *Butt v Graham*, 6 Utah 2, 133, 307 P.2d 892 (1957). However, in 1969,[4] former Utah Rule of Civil Procedure 65B(i) was enacted, which included provisions for "Postconviction Hearings." Former Rule 65B stated: "Special forms of pleadings and of writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, and other extraordinary writs, as heretofore known, are hereby abolished. Where no other plain, speedy and adequate remedy exists, relief may be obtained by appropriate action under these Rules." Utah R. Civ. P. 65B(a)(1977)(emphasis added). The Rule was amended numerous times over the following years.

In 1996, the Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 et seq. and Utah Rule of Civil Procedure 65C were enacted. The Post-Conviction Remedies Act and Rule 65C replaced the provisions of former Rule 65B which governed certain post-conviction proceedings. The Post-Conviction Remedies Act "establishes a substantive legal

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[4] "Rule 65B(i) was adopted by the Supreme Court effective August 20, 1969." Compiler's Notes, Utah R. Civ. P. 65(B)(i)(1977).

remedy for any person who challenges a conviction or sentence and who has exhausted all other legal remedies." Utah Code Ann. § 78-35a-102(1). Rule 65C contains the procedural provisions for the filing and commencement of a petition under the Post-Conviction Remedies Act.

Before enactment of the current Post-Conviction Remedies Act, this Court recognized the "availability of a writ of error coram nobis in a proper case" but noted that "its use is even more rare and restricted than that of habeas corpus." *Sullivan v. Turner*, 22 Utah 2d 85, 88, 448 P.2d 907, 909 (Utah 1968). The court of appeals found that "Rees's petition presents a rarely encountered situation" *Rees*, 2003 UT App. at ¶ 12. To the contrary, defendants frequently allege that counsel performed deficiently upon appeal. When seeking a remedy for this type of allegation, the appropriate avenue for relief is to file a civil petition for post-conviction relief under the Post-Conviction Remedies Act.

B. It is improper to resort to common law when a statutory remedy is available.

"The functions of the writ of coram nobis are strictly limited to an error of fact for which the legislature has provided no remedy, for it is only when the defendant is wholly without remedy that the common law provides one." *Gee*, 514 P.2d at 811. When a statute exists which properly governs a matter or provides an avenue for relief, it is improper to resort to the common law. *See Smith v. Sheffield*, 58 Utah 77, 197 P. 605, 607 (1921) (Statute held that wife was not a competent witness against her husband and therefore excluded resort to the common law); *Gibbs v. Gibbs*, 26 Utah 382, 73 P. 641 (Utah 1903)

(question must be determined by reference to the statute and "in the absence of statutory regulation, resort must be had to the rules of common law").

"[W]here a statute creates a liability and provides a remedy by suit specially adapted to its enforcement, other less appropriate common-law remedies are impliedly excluded." *Shriver v Woodbine Sav Bank of Woodbine*, 285 U.S. 467, 478, 52 S.Ct. 430, 434 (1932). *See also Turner v. Hawaii Paroling Authority*, 93 Hawaii 298, 1 P.3d 768 (2000) ("any post-conviction remedy which is available under this rule will require a resort to this rule in place of habeas corpus, coram nobis or any other vehicle").[5]

This Court has recognized that "[t]he postconviction hearing procedure is a successor to the common-law writ of error coram nobis." *State v Johnson*, 635 P.2d 36, 38 (Utah 1981).[6] *Johnson* explains that the remedy formerly available under coram nobis was adopted by Utah and is available under the post-conviction procedures. Accordingly, courts

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[5] *And see also In re Jacks*, 266 B.R. 728 (9th Cir. 2001) (by codifying statutory remedies the legislature has occupied the field and precluded resort to common law); *Scott County Fed of Teachers v Scott County School Dist #2*, 496 N.E.2d 610 (Ind 1986) (where statute provides for remedy it excludes any common law or equitable procedure); *People v Ingles*, 97 Cal.App.2d 867, 218 P.2d 987 (1950)(statutory remedy displaces the common-law remedy); *People v Lewis*, 64 Cal. App. 2d 564, 149 P.2d 27 (1944)(the existence of a statutory remedy precludes resort to the common law); *Wike v Lightner*, 1829 WL 2573 (Pa) ("common law remedies shall be superseded in all cases where a remedy is provided by act of assembly).

[6] Similarly, the United States Supreme Court has stated that in the federal arena, "28 U.S.C. § 2255, which provides federal prisoners a statutory motion to vacate a federal sentence. . . 'restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis.'" *Plaut v Spendthrift Farm, Inc.*, 514 U.S. 211, 235, (1995) (quoting *United States v Hayman*, 342 U.S. 205, 218 (1952).

in Utah have treated petitions filed as writs of error coram nobis as petitions for writ of habeas corpus or post-conviction relief. *See Lopez v. Shulsen*, 716 P.2d 787, 789 (Utah 1986); *Walker v. State*, 624 P.2d 687 (Utah 1981).

Here, the court of appeals found that "Rees's petition for extraordinary relief is best described as rooted in the ancient writ of error coram nobis, and therefore, the petition was properly filed with Rees's sentencing court." *Rees*, 2003 UT App. at ¶8. The court of appeals erred by viewing the petition as a writ of error coram nobis under the common law, since the Legislature has provided a clear statutory avenue for relief under the Post-Conviction Remedies Act. Rees had an appropriate statutory avenue for seeking relief. He was not "wholly without remedy." The Post-Conviction Remedies Act was specifically adopted to provide a remedy for just such an allegation as ineffective assistance of appellate counsel. Therefore, it was unnecessary and improper for the court of appeals to improvise a common law remedy.

With the promulgation of Utah's state post-conviction procedures, "the common law forms and procedures for extraordinary writs were abolished, in keeping with modern concepts of pleading and practice, but the remedies continue to be available." *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 682 (Utah 1995); *see also Indian Village Trading Post, Inc., v. Al Bench*, 929 P.2d 367, 369 (Utah App. 1996).

"The PCRA [Post-Conviction Remedies Act] replaced prior post-conviction remedies with a statutory, 'substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies.'" *Julian v.*

State, 2002 UT ___, ¶ 4, 52 P.3d 1168, 451 Utah Adv. Rep. 6., *quoting Utah Code Ann* § 78-35a-102.

Most claims which formerly could have been raised in a common law petition for writ of error coram nobis, can now be raised under the Post-Conviction Remedies Act. This does not necessarily mean that the common law writ of error coram nobis has been totally abolished. As the Kansas Supreme Court said: "We need not say here that under no circumstances is the writ [of error coram nobis] longer available under our procedure. But we are not now aware of a situation where adequate remedies are not provided by our comprehensive codes of civil and criminal procedure . . . and in addition the relief afforded in habeas corpus proceedings." *State v. Miller*, 161 Kan. 210, 216, 166 P.2d 680, 684 (1946).

Similarly, our courts have not held that the common-law writ of error coram nobis is no longer available in Utah under any circumstance. However, in a case like this, where a specific statutory avenue for seeking relief exists under the Post-Conviction Remedies Act, the court of appeals erred by resorting to an ancient common law writ rather than acknowledging that Rees's proper avenue for relief was to file a civil petition for post-conviction relief under the Post-Conviction Remedies Act.[7]

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[7] Even if a statutory remedy were not available, the common law writ of error coram nobis is not the proper writ to attempt to correct the type of irregularity which occurred in this case. The error in this case arose during appeal. "Another limitation upon the scope of the remedy in the nature of coram nobis is found in the rule that the writ or equivalent motion is never granted to relieve from circumstances arising subsequent to the judgment. *Huffman v. Alexander*, 197 Or. 283, 294, 253 P.2d 289, 342-

II. THE COURT OF APPEALS IMPROPERLY REVERSED THE TRIAL COURT DECISION TO DISMISS THE PETITION.

Rees filed a petition for extraordinary relief in the underlying criminal case. The trial court properly dismissed the petition because the case had already gone up on appeal. The court of appeals reversed the trial court and remanded with instructions that should Rees prevail, he be resentenced nunc pro tunc.

A. The petition was improperly filed in the criminal case, instead of as a separate civil action.

A petition following conclusion of a direct appeal is necessarily a post-conviction petition which must be filed as a separate civil action. Petitioner improperly filed his petition in the underlying criminal case, rather than as a separate civil action. Petitioner filed his petition as a petition for extraordinary relief under Utah Rule of Civil Procedure 65B(a)(b), rather than under the Post-Conviction Remedies Act and Rule 65C. However, under either rule 65B or rule 65C, the petition should have been filed as *civil* action separate

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43 (1953), *citing Collins v State*, 66 Kan. 201, 71 P.251, 60 L.R.A. 572; 31 Am.Jur., Judgments, § 3804.

"A writ of coram nobis seeks review of a judgment on the ground that judgment would not have been rendered but for mistakes of fact which were unknown to the trial court and the parties. *State v. Woodard*, 108 Utah 390, 391, 160 P.2d 432, 433 (1945). It "can properly be invoked only where there has been some mistake of fact which, if the truth had been known, would have prevented the conviction: and the failure to make known such fact must have been without fault or neglect on the part of the accused." *Valdez v State*, 22 Utah 2d 306, 307, n.2, 452 P.2d 551 (Utah 1969), *quoting Sullivan v Turner*, 22 Utah 2d 35, 448 P.2d 907, 909 (1968); *and see Sulaiman v United* States, 2002 WL 519718 (E.D.N.Y.) (petition for writ of error coram nobis claimed ineffective assistance of counsel, but coram nobis could not afford requested relief. Court treated it as a petition for habeas corpus).

from the criminal case. *See* Utah R. Civ. P. 65B(b)(2) and 65C(b); *See also Shunk v Fuchs*, 2000 WL 33250566, Nos. 20000192-CA, 20000193-CA (Utah App. May 4, 2000) (unpublished memorandum decision) (addendum H).

Procedural provisions for filing a petition for post-conviction relief are governed by Rule 65C of the Utah Rules of Civil Procedure. Utah Code Ann. § 78-35a-102(1), and Utah R. Civ. P. 65C(b) & (f). A petition for post-conviction relief is a *civil* action which must be filed as a civil case separate from the underlying criminal case. *Shunk v Fuchs*, 2000 WL 33250566, Nos. 20000192-CA, 20000193-CA (Utah App. May 4, 2000) (unpublished memorandum decision) (petition "was filed in the underlying criminal case rather than in a separate civil action, as required by Rule 65C.") (addendum H).[8]

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[8] The State argues that coram nobis is not the appropriate remedy. But even if a writ of coram nobis was proper, it should have been filed as a separate civil action. The court of appeals cites federal cases for its conclusion that coram nobis is a step in the criminal case and not like habeas corpus where relief is sought in a separate civil proceeding. *Rees*, 2003 UT App. 4 at ¶ 6. However, courts have disagreed about this. Several Utah cases have asserted that coram nobis is a civil action. *See Sullivan v Turner*, 22 Utah 2d 85, 89, 448 P.2d 907, 910 (1968) ("Petitions in habeas corpus and coram nobis are generally regarded as being analogous procedurally to civil proceedings."); *tate v Mitchell*, 569 P.2d 1117, 1118 (Utah 1977) (The writ of coram nobis, like habeas corpus, is civil in nature.)

The court of appeals also cites *Johnson* in support of its position by referring to the fact that *Johnson* says a petition for post conviction relief should be filed in the sentencing court. *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981). However, this does not mean that the petition should be filed in the underlying criminal case. It merely means that the petition should be reviewed by the Judge who sentenced the defendant. Current Civil Rule 65C states that a civil petition for post-conviction relief "shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered"and that "the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner." Utah R. Civ. P. 65C(b) and (f).

B. The criminal trial court lacked jurisdiction and therefore properly dismissed the petition.

Rees improperly filed his petition in the criminal case, and did so after his conviction had been affirmed on appeal. On May 10, 2001, the trial court dismissed the petition. In its minute entry, the court said: "This is time [sic] set for motion hearing on the motion for extraordinary relief. Hearing not held. State objects to the motion filed as the case has already been adjudicated in the Court of Appeals. Court dismisses the petition and finds that the case has been adjudicated in the Court of Appeals" (R. 128) (addendum E). Because the court of appeals had not remanded the case, the litigation was concluded.

On appeal of the dismissal of the petition, the court of appeals criticized the ruling of the trial court: "After reviewing the petition, the trial court, in a short minute entry, dismissed Rees's petition as focusing solely on issues that had been previously adjudicated by this court. The trial court's conclusion is incorrect." *Rees*, 2003 UT App 4, at ¶ 10.

The court of appeals reads meaning into the trial court's minute entry which is not part of its plain language. The minute entry does not state that the trial court was dismissing the petition because it focused on issues that had already been raised on appeal.[9] The trial court merely found that the case had been adjudicated in the court of appeals. The criminal case was complete and judgment was final. A valid sentence had been imposed, and the

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[9] Even if this were the reason the trial court dismissed the petition, the Court can affirm the trial court on any proper ground. *See Otteson v. Dept. of Human Services*, 945 P.2d 170,172 (Utah App. 1997); *Buehner Block Co. v. UWC Assoc.*, 752 P.2d 892, 895 (Utah 1988).

conviction and sentence were affirmed on appeal. Therefore the criminal case was closed and the trial court lacked jurisdiction.

"Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case." *State v. Montoya*, 825 P.2d 676, 679 (Utah App. 1991) (*citing State v. Babbel*, 813 P.2d 86, 88 (Utah 1991). As a general rule, a trial court loses jurisdiction once an appeal is perfected. *See Saunders v. Sharp*, 818 P.2d 574, 577 (Utah App. 1991); *Frost v. District Court*, 83 P.2d 737 (Utah 1938). A judgment is final following affirmance on appeal, when nothing is remanded for the trial court to reconsider or decide. *See Schoney v. Memorial Estates, Inc.*, 863 P.2d 59, 61 (Utah App. 1993).

On direct appeal, the court of appeals did not return Rees's case to the trial court, thus the criminal trial court no longer had jurisdiction to make additional rulings in the underlying criminal case. "When a matter is outside the court's jurisdiction, it retains only the authority to dismiss the action." *Varian-Eimac v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989). *See also Serrato v. Utah Transit Auth.*, 2000 UT App 299, ¶ 7, 13 P.3d 616; *State v Palmer*, 777 P.2d 521, 522 (Utah App. 1989).

The trial court properly dismissed the petition because it lacked jurisdiction. Lack of jurisdiction was not specifically given as the reason for the dismissal. However, "a lack of jurisdiction can be raised by the court or either party at any time." *A.J. MacKay Co v. Okland Const. Co.*,, 817 P.2d 323, 325 (Utah 1991). *See also Barton v. Barton*, 2001 UT App 199, 29 P.3d 13. The State's brief to the court of appeals asserted that the petition was properly dismissed for lack of jurisdiction.

The trial court properly dismissed the petition for extraordinary relief because the criminal trial court did not have jurisdiction to make additional rulings in the criminal case. The court of appeals erred in reversing the trial court decision.

C. The petition was improperly filed under Rule 65B instead of under the Post-Conviction Remedies Act and Rule 65C.

In addition to the fact that the petition was improperly filed in the criminal case instead of as a separate civil action, it was also improperly filed under Rule 65B instead of under the Post-Conviction Remedies Act and Rule 65C.

In his petition, Rees alleged that he was denied his right to appeal. The appropriate avenue for seeking relief on a claim of denial of the Constitutional right to appeal, (or a claim of ineffective assistance of appellate counsel), is under the Post-Conviction Remedies Act and Utah Rule of Civil Procedure 65C. Rule 65C contains the procedural provisions for the filing and commencement of a petition for post-conviction relief under the Post-Conviction Remedies Act. The Act provides a substantive legal remedy for those who wish to "challenge a conviction or sentence for a criminal offense." Utah Code Ann. § 78-35a-102(1).

Rule 65C "replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence . . . . Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the Rule 65B." Utah R. Civ. P. 65C, Advisory Committee Note (1996).

The petition was filed "under the provisions of Rule 65B(a)(b)" (R. 121). However, Rule 65B is inapplicable because it governs the procedures for those who claim they have "been wrongfully restrained of personal liberty." Utah R. Civ. P. 65B(b) (1998); Utah R. Civ. P. 65B, Advisory Committee Note (1998). Rule 65B(a) states: "Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restraint on personal liberty).... There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief." Because Rees had a remedy under the Act and rule 65C, current rule 65B, by its own terms, does not apply.

Rees's petition was improper because it was filed under Rule 65B when Rees was not challenging the terms or conditions of his confinement. Because of the nature of his petition and the relief it requested, it was more properly a petition for post-conviction relief under the Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 et seq, and Rule 65C. "In determining the character of a motion, the substance of the motion, not its caption, is controlling." *State v. Parker*, 872 P.2d 1041, 1044 (Utah App. 1994). Likewise, the character of a petition must be determined by its substance and the relief it seeks rather than by its caption.

Rees did not challenge the terms or conditions of his confinement but instead challenged his conviction and sentence, claiming that he was "denied his Constitutional right to appeal" (addendum E). Accordingly, the petition should have been filed under the

Post-Conviction Remedies Act and Rule 65C. The trial court properly dismissed the petition because it was improperly filed. The court of appeals erred in reversing the trial court's dismissal of the petition.

D. The court of appeals erroneously reviewed the matter as if the petition raised a claim of ineffective assistance of counsel when Rees never alleged ineffective assistance of counsel.

Rees's petition for extraordinary relief did not allege any claim of ineffective assistance of counsel. Rather, he argued that he had been denied his right to appeal. Likewise, when appealing the dismissal of his petition, Rees also did not argue any claim of ineffective assistance of counsel. Instead, he argued that the issue on appeal was whether "the Trial Court committed err [sic] in not considering the defendant's lack of fault in a procedural defect in the appeal process." (Brief at 1). Despite the fact that Rees had never argued or even mentioned the Sixth Amendment, his right to counsel, or ineffective assistance of counsel, the court of appeals created for him an ineffective assistance of counsel claim out of whole cloth. It wrote that "while Rees's petition for extraordinary relief fails to articulate a clear or concise claim, our reading of the petition suggests that the petition is predicated on a claim of ineffective assistance of appellate counsel." *State v. Rees*, 2003 UT App 4, at ¶ 8.

By what authority the court believed it could reverse on this ground is unclear. Utah courts will not reverse based on claims of error argued for the first time on appeal. *State v. Cram*, 2002 UT 37, ¶9, 46 P.3d 230 ("as a general rule, claims not raised before the trial court may not be raised on appeal"); *and see State v. Julian*, 966 P.2d 249, 258 (1998) ("we

will not consider issues raised for the first time on appeal"). A fortiori, they may not reverse on a ground never briefed or argued, even on appeal.

This Court has frequently refused to "engage in constructing arguments out of whole cloth on behalf of defendants," even in capital cases. *State v. Arguelles*, 2003 UT 1, ¶ 125, 63 P.2d 731 (quoting *State v . Lafferty*, 749 P.2d 1239, 1247 n. 5 (Utah 1988), *habeas corpus granted on unrelated grounds in Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991) *cert. denied* 504 U.S. 911, 112 S.Ct. 1942 (1992). Yet the court of appeals has done precisely that in this possession-of-marijuana case, despite the fact that, as demonstrated above, Rees has a clear legal remedy if he will only avail himself of it.

III. REES IS NOT ENTITLED TO A SECOND DIRECT APPEAL FROM THE SAME FINAL JUDGMENT.

The court of appeals reversed the trial court's decision dismissing Rees's petition, and remanded for further consideration. The court also ruled that if Rees is able to satisfy the requirements for a writ of error coram nobis, the trial court "must then grant Rees's petition and reenter his sentence nunc-pro-tunc." *Rees*, 2003 UT App. 4 at ¶¶ 11, 15. Presumably, after a re-sentencing nunc pro tunc, Rees would be allowed to proceed with a second appeal. This relief is not appropriate or available. The court of appeals ruling would provide Rees with two direct appeals from the same final judgment.

In his petition, Rees alleged that he was denied his right to appeal. However, Rees had an appeal. *State v. Rees*, 2001 UT App 27 (unpublished memorandum decision)

(addendum C). The petition asks for inappropriate relief, by asking that Rees be re-sentenced and allowed to file a second direct appeal.

The petition states:

> 12. . . . the defendant has been denied his right to appeal through no fault of his own.
> 13. The only remedy for this type of Problem is threw [sic] a Petition for Extraordinary Relief under Rule 65B of the Utah Rules of Civil Procedure. State v. Johnson, 635 P.2d 36 (1981).

(R. 123) (addendum D).

By alleging that Rees was denied his right to appeal, the petition asserts a claim which is simply not true. Rees did receive an appeal. The court of appeals entered its decision on February 1, 2001. *State v. Rees*, 2001 UT App 27 (unpublished decision). Thus, Rees was never denied his right to appeal because he had an appeal. The claim which should have been raised was that Rees received ineffective assistance of appellate counsel. However, Rees has never asserted a claim of ineffective assistance of appellate counsel.

If a defendant has been denied his constitutional right to appeal, then nunc pro tunc re-sentencing, such as was provided in *State v Johnson*, 635 P.2d 36, 38 (Utah 1981), may be appropriate, in order to provide a defendant with a first appeal as of right. But a *Johnson* re-sentencing is only available when a defendant has been completely denied his right to appeal, not when a defendant has already had an appeal but alleges ineffective assistance of appellate counsel on appeal. *See State v Jiminez*, 938 P.2d 264 (Utah 1997); *State v Hallett*, 856 P.2d 1060 (Utah 1993); *State v Johnson*, 635 P.2d 36 (Utah 1981). This is because denial of counsel altogether on appeal warrants a presumption of prejudice, but an

allegation of mere ineffective assistance of counsel on appeal does not. *Smith v Robbins*, 528 U.S. 259, 286, 120 S.Ct. 746, 764 (2000).

"The standard for judging ineffective assistance of appellate counsel is the same as the standard for judging ineffective assistance of trial counsel." *Bruner v Carver*, 920 P.2d 1153, 1157 (Utah 1996). To prove ineffective assistance of appellate counsel, Rees would have to show that his attorney's performance was deficient, and that the deficient performance prejudiced him. *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

To meet the prejudice requirement, Rees would have to demonstrate that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. In other words, that the outcome of his appeal would have been different - that his conviction or sentence would have been reversed on appeal. *Smith v Robbins*, 528 U.S. 259, 120 S.Ct. 746) (2000) (must show a reasonable probability that he would have prevailed on his appeal); *and see Carter v Galetka*, 2001 UT 96, ¶ 47-48, 44 P.3d 626.

The courts have defined a reasonable probability as "a probability sufficient to undermine confidence in the reliability of the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "The error must be such that we lose confidence in the result on appeal." *Butterfield v Cook*, 817 P.2d 333, 336 (Utah App), *cert denied* 826 P.2d 651 (Utah 1991).

Rees already had a direct appeal. He is not entitled to a second appeal from the same final judgment. If a claim of ineffective assistance of appellate counsel is properly raised in a civil petition for post-conviction relief, and the reviewing court finds that appellate counsel's performance was deficient and that Rees was prejudiced, (that there is a reasonable probability that Rees would have prevailed on appeal), the remedy would be to vacate the conviction or sentence, not to allow Rees a second direct appeal on the same final judgment because his counsel was ineffective the first time around. *See Utah Code Ann* § 78-35a-108(1).

The court of appeals erred by reversing the trial court, and remanding with instructions that if Rees prevails, he would be entitled to a second direct appeal from the same final judgment.

CONCLUSION

The court of appeals erred by resorting to use of the ancient common law writ of error coram nobis when the legislature has provided a clear avenue for seeking relief under the Post-Conviction Remedies Act. By its holding, "the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Supreme Court's power of supervision." *Utah R. App P* 46(a)(3). In addition, the court of appeals decision conflicts with decisions of this Court. *Utah R. App. P* 46(a)(2).

The court of appeals should have affirmed the trial court's dismissal of the petition. It could also have pointed out that the appropriate avenue for seeking relief was a civil

petition for post-conviction relief, filed under the Post-Conviction Remedies Act and Utah Rule of Civil Procedure 65C.

Based on the facts and arguments set forth above, the State respectfully requests that this Court Reverse the Court of Appeals decision.

RESPECTFULLY submitted this 17th day of November 2003.

MARK SHURTLEFF
Attorney General

ERIN RILEY
Assistant Attorney General
Counsel for State of Utah

CERTIFICATE OF SERVICE

I hereby certify that on 17 November 2003, I mailed, postage prepaid, two accurate copies of the foregoing BRIEF OF PETITIONER ON WRIT OF CERTIORARI to:

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Counsel for Respondent Rees

Lee Nakamura

Addenda

Addendum A

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Troy **REES**, Defendant and Appellant.

No. 20010490-CA.

Jan. 9, 2003.

After his conviction for possession of marijuana with intent to distribute was affirmed, petitioner moved for extraordinary relief. The Second District Court, Ogden Department, Parley R. Baldwin, J., dismissed the petition. Petitioner appealed. The Court of Appeals, Thorne, J., held that: (1) petition was best described as writ of error coram nobis and thus was properly filed with sentencing court; (2) fact that petitioner's claim of ineffective assistance of appellate counsel was argued by same counsel that represented petitioner on direct appeal did not alone warrant dismissal of claim; and (3) petition did not present issues already presented to, or ruled on by, Court of Appeals.

Reversed and remanded with instructions.

West Headnotes

[1] Criminal Law ⚿1134(3)
110k1134(3) Most Cited Cases

[1] Criminal Law ⚿1158(1)
110k1158(1) Most Cited Cases

On review from dismissal of petition for extraordinary relief, the Court of Appeals reviews the trial court's conclusions of law for correctness and its factual findings for plain error.

[2] Criminal Law ⚿1576
110k1576 Most Cited Cases

Defendant's petition for extraordinary relief was best described as rooted in ancient writ of error coram nobis, and therefore, petition was properly filed with sentencing court instead of filed as a separate civil action for post conviction relief; while defendant's petition failed to articulate clear or concise claim, petition suggested that it was predicated on claim of ineffective assistance of appellate counsel, while sole relief defendant requested was resentencing nunc-pro-tunc to permit him opportunity to pursue a meaningful appeal. U.S.C.A. Const.Amend. 6; Rules Civ.Proc., Rules 65B, 65C.

[3] Criminal Law ⚿1570
110k1570 Most Cited Cases

Generally, a post conviction petition for extraordinary relief must be filed in a separate civil action under rule governing post conviction relief. Rules Civ.Proc., Rule 65C.

[4] Criminal Law ⚿1412
110k1412 Most Cited Cases

In certain, very limited circumstances, a post conviction petition for extraordinary relief is properly filed and styled as a writ of error coram nobis. Rules Civ.Proc., Rule 65B.

[5] Action ⚿66
13k66 Most Cited Cases

When interpreting a document submitted to the court, rather than being confined to the document's caption, the Court of Appeals looks to the substance of the document to determine its nature.

[6] Criminal Law ⚿1412
110k1412 Most Cited Cases

The writ of error coram nobis is a writ used to correct fundamental errors which render a criminal proceeding irregular and invalid. Rules Civ.Proc., Rule 65B

[7] Criminal Law ⚿1412
110k1412 Most Cited Cases

[7] Criminal Law ⚿1413
110k1413 Most Cited Cases

Coram nobis is a step in a criminal case, and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding; thus, a petitioner seeking relief through coram nobis should file the petition with the sentencing court. Rules Civ.Proc., Rule

65B

[8] Criminal Law ⚿1412
110k1412 Most Cited Cases

A defendant who has been convicted and has exhausted his normal avenues of appeal may, under the principles of coram nobis, only ask the sentencing court to modify or vacate a judgment Rules Civ Proc , Rule 65B

[9] Criminal Law ⚿1412
110k1412 Most Cited Cases

Relief under the writ of error coram nobis is narrow and allowed only under circumstances compelling such action to achieve justice Rules Civ Proc , Rule 65B

[10] Criminal Law ⚿1412
110k1412 Most Cited Cases

The present-day scope of coram nobis is broad enough to encompass not only errors of fact that affect the validity or regularity of legal proceedings, but in addition, legal errors of a constitutional or fundamental proportion Rules Civ Proc , Rule 65B

[11] Criminal Law ⚿1412
110k1412 Most Cited Cases

Included among the limited number of claims that may result in relief being granted through petitions rooted in coram nobis is ineffective assistance of appellate counsel U S C A Const Amend 6, Rules Civ Proc , Rule 65B

[12] Criminal Law ⚿1440(3)
110k1440(3) Most Cited Cases

Fact that ineffective assistance of appellate counsel claim asserted by petitioner in petition for extraordinary relief before the sentencing court was argued by same counsel that represented petitioner on direct appeal did not alone warrant dismissal of that claim, rules restricted such behavior only on appeal U S C A Const Amend 6, Rules of Prof Conduct, Rules 1 7(b)

[13] Criminal Law ⚿1433(2)
110k1433(2) Most Cited Cases

Defendant's petition for extraordinary relief did not present issues already presented to, or ruled on by Court of Appeals, petition essentially asserted that defendant's appellate counsel was ineffective and that defendant was denied his right to meaningful appeal of his conviction for possession of marijuana with intent to distribute, while defendant's direct appeal from his conviction presented three issues for Court of Appeals' review, none of which focused on effectiveness of his attorney at any level of process, and in affirming conviction, Court of Appeals did not address issue of effectiveness of defendant's appellate counsel U S C A Const Amend 6, Rules Civ Proc , Rule 65B

[14] Criminal Law ⚿1412
110k1412 Most Cited Cases

Writ of error coram nobis is not a substitute for a direct appeal, rather, "coram nobis" is available in limited circumstances, to modify or vacate a judgment where extra-record facts show that the defendant has been deprived of his constitutional right to a fair trial or meaningful appeal Rules Civ Proc , Rule 65B

[15] Criminal Law ⚿1412
110k1412 Most Cited Cases

In a post conviction petition for coram nobis type relief, petitioner must show that (1) the claim has neither been previously adjudicated, nor is it frivolous on its face, (2) an error was made during the proceedings that was unknown to the petitioner at the time, (3) a more traditional avenue of relief is not available to the petitioner, (4) valid reasons exist for the failure to attack the error in a previous proceeding, and (5) the error was of such a fundamental nature as to render the proceedings irregular and invalid Rules Civ Proc Rule 65B
***121** H Don Sharp, Ogden, for Appellant

Mark L Shurtleff and Erin Riley, Assistant Attorney General, Salt Lake City, for Appellee

Before JACKSON, P J , BILLINGS, Associate Presiding Judge and THORNE, J

OPINION

THORNE, Judge

¶ 1 Troy Rees appeals from the trial court's dismissal of his Petition for Extraordinary Relief We reverse and remand

¶ 2 Following our February 1, 2001 affirmance of Rees's criminal conviction for possession of marijuana with intent to distribute, *see State v Rees* 2001 UT App 27, 2001 WL 311418 (affirming Rees's conviction based in-part upon Rees's failure to incorporate certain record information necessary to our proper review of his claim), Rees filed a motion to resentence and a petition for extraordinary relief with his sentencing court, under the original criminal case number In his petition for extraordinary relief, Rees's attorney, who has represented Rees throughout his trial and appeal, essentially asserted that Rees had lost his opportunity for meaningful appellate review of the conviction due to ineffective assistance of counsel [FN1] On May ***122** 10, 2001, the trial court dismissed Rees's petition for extraordinary relief as focused solely on issues previously adjudicated by this court Rees now appeals this dismissal

> FN1 While Rees's counsel failed to actually adopt this term, the thrust of the petition is found in paragraphs seven through ten, wherein Rees's counsel admits having failed to diligently supervise certain, possibly material, aspects of Rees's appeal

ISSUE AND STANDARD OF REVIEW

[1] ¶ 3 Rees's sole argument on appeal is that the trial court erred in dismissing his petition for extraordinary relief We review the trial court's conclusions of law for correctness and its factual findings for plain error *See Parsons v Barnes,* 871 P 2d 516, 518 (Utah 1994)

ANALYSIS

I Jurisdiction

¶ 4 In response to Rees's claim, the State argues that because Rees filed his petition for extraordinary relief as a motion before his sentencing court, and not as a separate civil action for post conviction relief under rule 65C of the Utah Rules of Civil Procedure, the trial court was never properly vested with jurisdiction We disagree

[2][3][4][5] ¶ 5 Generally, the State's position that a post conviction petition for extraordinary relief must be filed in a separate civil action under rule 65C of the Utah Rules of Civil Procedure, would be correct *See* Utah R Civ P 65C(a)-(b) However, in certain, very limited circumstances, a post conviction petition for extraordinary relief is properly filed under rule 65B(b) and styled as a writ of error coram nobis *See State v Johnson* 635 P 2d 36, 38 (Utah 1981) (acknowledging the availability of coram nobis relief under rule 65B(i), now rule 65B(b) of the Utah Rules of Civil Procedure), [FN2] *see also United States v Morgan,* 346 U S 502, 505-06, 74 S Ct 247, 249-50, 98 L Ed 248 (1954) (discussing the writ of error coram nobis, its role, and the proper procedure for seeking the writ) Finally, when interpreting a document submitted to the court, rather than being confined to the document's caption, we look to the substance of the document to determine its nature *See Renn v Utah State Bd of Pardons,* 904 P 2d 677, 681 (Utah 1995) ("We will look to the substance of the action and the nature of the relief sought in determining the true nature of the extraordinary relief requested "), *Debry v Fid Nat Title Ins Co* , 828 P 2d 520, 522 (Utah Ct App 1992)

> FN2 While we are aware that rule 65C of the Utah Rules of Civil Procedure, dealing specifically with post conviction petitions for extraordinary relief, was enacted after *State v Johnson,* 635 P 2d 36 (Utah 1981) was decided, this fact has no impact on our present decision First, rule 65B(b) applies to post conviction petitions asserting claims for wrongful restraint on personal liberty not governed by rule 65C *See* Utah R Civ P 65B(b)(1) Second, our supreme court, at least obliquely, reaffirmed its *Johnson* holding, and the survival of coram nobis type relief, in both *State v Jiminez,* 938 P 2d 264, 265 (Utah 1997), and *State v Hallett* 856 P 2d 1060, 1062 n 2 (Utah 1993)

[6][7][8] ¶ 6 "The writ of error coram nobis is a

writ used to correct fundamental errors which render a criminal proceeding irregular and invalid." *Cardall v United States,* 599 F Supp. 912, 914-15 (D Utah 1984) (footnote omitted). Coram nobis is a step in a criminal case, *see Abel v Tinsley,* 338 F 2d 514, 515 (10th Cir.1964), "and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding." *Morgan* 346 U.S. at 505 n. 4, 74 S.Ct. at 249 n. 4. Thus, a petitioner seeking relief through coram nobis should file the petition with the sentencing court. *See Johnson,* 635 P.2d at 38 ("The appropriate remedy in a case such as this is a motion for relief under Utah Rules of Civil Procedure, Rule 65B(i) [presently embodied in rule 65B(b)], Postconviction hearings, which in this case should be brought in the sentencing court."). Finally, under our interpretation of coram nobis, a defendant who has been convicted and has exhausted his normal avenues of appeal may, under the principles of coram nobis, only ask the sentencing court to modify or vacate a judgment. *See Johnson,* 635 P 2d at 38.

[9][10][11] ¶ 7 "Relief under the writ of error coram nobis is narrow and allowed 'only under circumstances compelling such action to achieve justice.' " *Cardall,* 599 F.Supp. at 915 (quoting ***123***Morgan,* 346 U S. at 511, 74 S.Ct. at 252). However, " '[t]he present-day scope of coram nobis is broad enough to encompass not only errors of fact that affect the validity or regularity of legal proceedings, but in addition, legal errors of a constitutional or fundamental proportion.' " *Tillman v United States,* 32 M.J. 962, 965 (A.C.M.R.1991) (quoting *United States v Wickham,* 474 F Supp. 113, 116 (C D Cal.1979)). Included among the limited number of claims that may result in relief being granted through petitions rooted in coram nobis is ineffective assistance of appellate counsel. *See Johnson,* 635 P 2d at 37- 38; *Tillman,* 32 M.J. at 966.

[12] ¶ 8 Here, while Rees's petition for extraordinary relief fails to articulate a clear or concise claim, our reading of the petition suggests that the petition is predicated on a claim of ineffective assistance of appellate counsel [FN3] Moreover, the sole relief Rees requests in his petition is resentencing nunc-pro-tunc to permit him an opportunity to pursue a meaningful appeal. Thus, based merely on the face of the petition, we conclude that Rees's petition for extraordinary relief is best described as rooted in the ancient writ of error coram nobis, and therefore, the petition was properly filed with Rees's sentencing court.

> FN3. We find it concerning that counsel representing Rees in this matter, and arguing that Rees's appellate counsel was ineffective, is the same attorney who represented Rees throughout his criminal trial and appeal. However, because our rules only restrict such behavior on appeal, *see State v Garrett,* 849 P 2d 578, 580 n 3 (Utah Ct.App.1993), we cannot dismiss Rees's claim on this basis However, we urge both Rees and his counsel to review rule 1.7(b) of the Utah Rules of Professional Conduct concerning the conflict of interest implicated in allowing counsel to argue his own ineffectiveness.

II. Dismissal

¶ 9 Rees argues that the trial court erred in dismissing his claim after concluding that it had been previously adjudicated by this court We review a trial court's legal conclusions for correctness, and, absent a showing of clear error, we accept the trial court's findings of fact. *See Stewart v State,* 830 P 2d 306, 309 (Utah Ct App.1992)

[13] ¶ 10 In the instant case, Rees's petition, submitted to his sentencing court, essentially asserted that his appellate counsel was ineffective and that therefore he has been denied his right to the meaningful appeal of his conviction. After reviewing the petition, the trial court, in a short minute entry, dismissed Rees's petition as focusing solely on issues that had been previously adjudicated by this court. The trial court's conclusion is incorrect.

¶ 11 In his direct appeal, Rees presented three issues for our review, none of which focused on the effectiveness of his attorney at any level of the process Moreover, in the memorandum decision addressing Rees's direct appeal, *see State v Rees* 2001 UT App 27, 2001 WL 311418, we did not address the issue of the effectiveness of Rees's appellate counsel. Because this issue has never

been presented to this court, nor ruled upon by this court, the trial court's conclusion is incorrect as a matter of law Therefore, we reverse the trial court's decision to dismiss Rees's petition and remand this case for further consideration

¶ 12 Because Rees's petition presents a rarely encountered situation--a request for extraordinary relief patterned after the writ of error coram nobis--we clarify the standard under which the trial court should review the petition on remand

[14] ¶ 13 A writ of error coram nobis is not a substitute for a direct appeal *See Tillman* 32 M J at 965 Rather, coram nobis is available in "limited circumstances, to modify or vacate a judgment where extra-record facts show[ ] that the defendant ha[s] been deprived of his constitutional right to a fair trial [or meaningful appeal]" *Johnson,* 635 P 2d at 38 Due to the rarity of petitions styled after the writ of error coram nobis in Utah, we have yet to articulate a clear standard under which trial courts should review these petitions Therefore, we have examined the approach adopted by courts outside of Utah for assistance and conclude that the standard articulated by the Ninth Circuit Court of Appeals is best suited to our purposes.

***124** [15] ¶ 14 In *Hirabayashi v United States,* 828 F 2d 591 (9th Cir 1987), after setting forth a detailed account of facts concerning the internment of people of Japanese ancestry during World War II--facts central to the petitioner's claim--the Ninth Circuit Court of Appeals addressed the nature of coram nobis petitions and established a four-part test that a petitioner must satisfy before coram nobis type relief can be granted *See id* at 594-98 These factors include a showing by the petitioner that (1) an error was made during the proceedings that was unknown to the petitioner at the time, (2) a more traditional avenue of relief is not available to the petitioner, (3) valid reasons exist for the failure to attack the error in a previous proceeding, and '(4) the error was of such a fundamental nature as to render the proceedings irregular and invalid" *Tillman* 32 M J at 965 (citing *Hirabayashi* 828 F 2d at 604), *see also Hale v United States,* No 99-07, 1999 WL 1087020, *2, 1999 CCA LEXIS 303, at *6 (A F Ct Crim App Nov 9, 1999) In addition to these factors, we would add that the petitioner must also satisfy the requirements set forth in rule 65B and establish that the claim has neither been previously adjudicated, nor is it frivolous on its face *See* Utah R Civ P 65B(b)(5)

¶ 15 Thus, to succeed in his petition in the trial court, Rees must first make a threshold showing that his petition contains issues that have not been adjudicated previously and presents issues that are not frivolous on their face The trial court must then determine whether (1) an error was made during Rees's appeal that was unknown to him, (2) no more traditional avenue of relief is available to Rees, (3) valid reasons exist for Rees's failure to attack the error in a previous proceeding, and "(4) the error was of such a fundamental nature as to render the proceedings irregular and invalid" *Tillman* 32 M J at 965 (citing *Hirabayashi* 828 F 2d at 604) If the trial court finds that Rees is able to satisfy each of these requirements, the court must then grant Rees's petition and reenter his sentence nunc-pro-tunc

CONCLUSION

¶ 16 Rees's petition for extraordinary relief is properly filed under rule 65B(b), the successor rule to the writ of error coram nobis Therefore, the court responsible for imposing sentence on Rees for his underlying conviction is vested with jurisdiction over Rees's petition Moreover, Rees's claim, that he has been denied his right to a meaningful appeal because of the ineffective assistance of his appellate counsel, was not the subject of any prior adjudication in this court, thus, the trial court erred in dismissing Rees's petition on that basis Finally, should Rees prevail, the trial court's authority is limited to merely resentencing Rees nunc-pro-tunc

¶ 17 WE CONCUR NORMAN H JACKSON, Presiding Judge and JUDITH M BILLINGS, Associate Presiding Judge

END OF DOCUMENT

Addendum B

CHAPTER 35a

POST-CONVICTION REMEDIES ACT

Part 1

General Provisions

Part 2

Capital Sentence Cases

Part 3

Postconviction Testing of DNA

PART 1

GENERAL PROVISIONS

78-35a-101. Short title.

This act shall be known as the "Post-Conviction Remedies Act." 1996

78-35a-102. Replacement of prior remedies.

(1) This chapter establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2) Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure

(2) This chapter does not apply to

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure or

(c) actions taken by the Board of Pardons and Parole 1996

78-35a-103. Applicability — Effect on petitions.

Except for the limitation period established in Section 78-35a-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996 1996

78-35a-104. Grounds for relief — Retroactivity of rule.

(1) Unless precluded by Section 78-35a-106 or 78-35a-107 a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution,

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah

Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected,

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner,

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution or

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence,

(ii) the material evidence is not merely cumulative of evidence that was known,

(iii) the material evidence is not merely impeachment evidence, and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received

2) The question of whether a petitioner is entitled to the nefit of a rule announced by the United States Supreme urt, Utah Supreme Court, or Utah Court of Appeals after e petitioner s conviction became final shall be governed by plicable state and federal principles of retroactivity 1996

-35a-105. Burden of proof.

The petitioner has the burden of pleading and proving by a eponderance of the evidence the facts necessary to entitle e petitioner to relief The respondent has the burden of eading any ground of preclusion under Section 78-35a-106, it once a ground has been pled, the petitioner has the burden disprove its existence by a preponderance of the evidence 1996

8-35a-106. Preclusion of relief — Exception.

(1) A person is not eligible for relief under this chapter upon ny ground that

(a) may still be raised on direct appeal or by a post-trial motion

(b) was raised or addressed at trial or on appeal,

(c) could have been but was not raised at trial or on appeal

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief, or

(e) is barred by the limitation period established in Section 78-35a-107

2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise hat ground was due to ineffective assistance of counsel 1996

78-35a-107. Statute of limitations for post-conviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued

2) For purposes of this section, the cause of action accrues on the latest of the following dates

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken,

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken,

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court if no petition for writ of certiorari is filed,

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence of evidentiary facts on which the petition is based

(3) If the court finds that the interests of justice require a court may excuse a petitioner s failure to file within the time limitations

(4) Sections 78-12-35 and 78-12-40 do not extend the limitations period established in this section 1996

78-35a-108. Effect of granting relief — Notice.

(1) If the court grants the petitioner's request for relief it shall either

(a) modify the original conviction or sentence or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate

(2) (a) If the petitioner is serving a felony sentence the order shall be stayed for five days Within the stay period the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner

(c) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary 1996

78-35a-109. Appointment of counsel.

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section

(2) In determining whether to appoint counsel, the court shall consider the following factors

(a) whether the petition contains factual allegations that will require an evidentiary hearing, and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition 1996

78-35a-110. Appeal — Jurisdiction.

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78-2-2 or 78-2a-3 1996

PART 2

CAPITAL SENTENCE CASES

78-35a-201. Post-conviction remedies — 30 days.

A post-conviction remedy may not be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds for application are based on facts or circumstances which developed or first became known within that period of time 1997

78-35a-202. Appointment and payment of counsel in death penalty cases.

(1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be

MICHIE'S UTAH COURT RULES ANNOTATED
UTAH RULES OF **CIVIL PROCEDURE**
PART VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Current with amendments through February 20, 2002

Rule **65C**. Post-conviction relief.

(a) Scope. This rule shall govern proceedings in all petitions for post-conviction relief filed under **Utah** Code Ann. § 78-35a-101 et seq., Post-Conviction Remedies Act.

(b) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(c) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(d) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(1) affidavits, copies of records and other evidence in support of the allegations;

(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(4) a copy of all relevant orders and memoranda of the court.

(e) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(f) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(g)(1) Summary dismissal of claims. The assigned judge s hall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(2) A petition is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claims have no arguable basis in fact; or

(C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a petition is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(n) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of **Utah** represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(i) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(j) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(1) consider the formation and simplification of issues;

(2) require the parties to identify witnesses and documents; and

(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(k) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(l) Discovery; records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(m) Orders; stay.

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be

stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(n) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Section 64-13-23 and sections 21-7-3 through 21-7- 4.7 govern the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(o) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of **Utah** in accord with the statutes governing appeals to those courts.

(Added effective July 1, 1996.)

Rules Civ. Proc., Rule **65C**

UT ST RCP Rule **65C**

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MICHIE'S UTAH COURT RULES ANNOTATED
UTAH RULES OF CIVIL PROCEDURE
PART VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Current with amendments through February 20, 2002

Rule **65B**. Extraordinary relief.

(a) Availability of remedy. Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restraint on personal liberty), paragraph (c) (involving the wrongful use of public or corporate authority) or paragraph (d) (involving the wrongful use of judicial authority, the failure to exercise such authority, and actions by the Board of Pardons and Parole). There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b) Wrongful restraints on personal liberty.

(1) Scope. Except for instances governed by Rule 65C, this paragraph shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty, and the court may grant relief appropriate under this paragraph.

(2) Commencement. The proceeding shall be commenced by filing a petition with the clerk of the court in the district in which the petitioner is restrained or the respondent resides or in which the alleged restraint is occurring.

(3) Contents of the petition and attachments. The petition shall contain a short, plain statement of the facts on the basis of which the petitioner seeks relief. It shall identify the respondent and the place where the person is restrained. It shall state the cause or pretense of the restraint, if known by the petitioner. It shall state whether the legality of the restraint has already been adjudicated in a prior proceeding and, if so, the reasons for the denial of relief in the prior proceeding. The petitioner shall attach to the petition any legal process available to the petitioner that resulted in restraint. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint.

(4) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(5) Dismissal of frivolous claims. On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order need not state findings of fact or conclusions of law. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

(6) Responsive pleadings. If the petition is not dismissed as being frivolous on its face, the court shall direct the clerk of the court to serve a copy of the petition and a copy of any memorandum upon the respondent by mail. At the same time, the court may issue an order directing the respondent to answer or otherwise respond to the petition, specifying a time within which the respondent must comply. If the circumstances require, the court may also issue an order directing the respondent to appear before the court for a hearing on the legality of the restraint. An answer to a petition shall state plainly whether the respondent has restrained the person alleged to have been restrained, whether the person so restrained has been transferred to any other person, and if so, the identity of the transferee, the date of the transfer, and the reason or authority for the transfer. Nothing in this paragraph shall be construed to prohibit the court from ruling upon the petition based upon a dispositive motion.

(7) Temporary relief. If it appears that the person alleged to be restrained will be removed from the court's jurisdiction or will suffer irreparable injury before compliance with the hearing order can be enforced, the court shall issue a warrant directing the sheriff to bring the respondent before the court to be dealt with according to law. Pending a determination of the petition, the court may place the person alleged to have been restrained in the custody of such other persons as may be appropriate.

(8) Alternative service of the hearing order. If the respondent cannot be found, or if it appears that a person other than the respondent has custody of the person alleged to be restrained, the hearing order and any other process issued by the court may be served on the person having custody in the manner and with the same effect as if that person had been named as respondent in the action.

(9) Avoidance of service by respondent. If anyone having custody of the person alleged to be restrained avoids service of the hearing order or attempts wrongfully to remove the person from the court's jurisdiction, the sheriff shall immediately arrest the responsible person. The sheriff shall forthwith bring the person arrested before the court to be dealt with according to law.

(10) Hearing or other proceedings. In the event that the court orders a hearing, the court shall hear the matter in a summary fashion and shall render judgment accordingly. The respondent or other person having custody shall appear with the person alleged to be restrained or shall state the reasons for failing to do so. The court may nevertheless direct the respondent to bring before it the person alleged to be restrained. If the petitioner waives the right to be present at the hearing, the court shall modify the hearing order accordingly. The hearing order shall not be disobeyed for any defect of form or any misdescription in the order or the petition, if enough is stated to impart the meaning and intent of the proceeding to the respondent.

(c) Wrongful use of or failure to exercise public authority.

(1) Who may petition the court; security. The attorney general may, and when directed to do so by the governor shall, petition the court for relief on the grounds enumerated in this paragraph. Any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in subparagraph (2) of this paragraph may petition the court under this paragraph if (A) the person claims to be entitled to an office unlawfully held by another or (B) if the attorney general fails to file a petition under this paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73.

(2) Grounds for relief. Appropriate relief may be granted: (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of **Utah**; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of **Utah** without being legally incorporated; (D) where any corporation has violated the laws of the state of **Utah** relating to the creation, alteration or renewal of corporations; or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises.

(3) Proceedings on the petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(d) Wrongful use of judicial authority or failure to comply with duty; actions by board of pardons and parole.

(1) Who may petition. A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief.

(2) Grounds for relief. Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled; or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

(3) Proceedings on the petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a

transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(4) Scope of review. Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

(Amended effective September 1, 1991; May 1, 1993; July 1, 1996.)

Rules Civ. Proc., Rule **65B**

UT ST RCP Rule **65B**

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Foundation of jurisdiction of court of equity to issue injunction to restrain trespass on real property was probability of irreparable injury, inadequacy of pecuniary compensation, and prevention of multiplicity of suits where rights of numerous persons would be involved. Mc Gregor v Silver King Min. Co, 14 U. 47, 45 P 1091, 60 Am. St, Rep. 883.

Before court would grant injunction because of trespass already committed, there had to be a finding of some fact tending to show probability that defendant would again commit a trespass upon plaintiff's land Anderson v. Jensen, 71 U. 295, 265 P 745.

Power of court.

Provision similar to subd. (1) was not designed to deprive the courts of any part of that jurisdiction with respect to injunctions recognized by equity; the commission or the continuance of the act could be restrained, and the district courts had the power, in proper cases, to issue mandatory as well as preventive injunctions. Injunctions could be granted to restore rights that had been lost, as well as to prevent future injuries Henderson v Ogden City Ry. Co., 7 U. 199, 26 P. 286

Showing of injury and damage.

In order to successfully maintain injunction proceeding, it had to appear that acts of those sued caused injury, and that, if such acts were continued, damage would follow. West Point Irr. Co. v. Moroni & Mt. Pleasant Irr. Ditch Co, 21 U. 229, 61 P. 16.

RULE 65B

EXTRAORDINARY WRITS

(a) **Special Forms of Writs Abolished.** Special forms of pleadings and of writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, and other extraordinary writs, as heretofore known, are hereby abolished. Where no other plain, speedy and adequate remedy exists, relief may be obtained by appropriate action under these Rules, on any one of the grounds set forth in subdivisions (b) and (f) of this Rule

Compiler's Notes.

There is no Fed. Rule covering this subject matter.

Extraordinary writ.

An extraordinary writ is not a proceeding for general review and cannot be used as such, where the court below had jurisdiction of the parties and the subject matter, there was a right of appeal that was, if timely used, an adequate remedy at law and fact that petitioner allowed that right of appeal to expire does not entitle him to seek a writ of prohibition claiming error Anderson v. Baker, 5 U. (2d) 33, 296 P. 2d 283.

(b) **Grounds for Relief.** Appropriate relief may be granted:

(1) Where any person usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, or an office in a corporation created by the authority of this state; or any public officer, civil or military, does or permits to be done any act which by the provisions of law works a forfeiture of his office; or an association of persons act as a corporation within this state without being legally incorporated; or any corporation has offended against any provision of the law, as it may have been amended, by or under which law such corporation was created, altered or renewed; or any corporation has forfeited its privileges and franchises by nonuser or has committed an act amounting to a surrender or a forfeiture of its corporate rights, privileges and franchises or has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred; or

trial had same authority as other judge to vacate former order, was not in excess of jurisdiction and did not warrant issuance of writ of prohibition. Ordinarily, failure to observe meticulous propriety did not go to jurisdiction of court so as to warrant writ of prohibition. Smith v. District Court of Second Judicial District in and for Morgan County, 69 U. 493, 256 P. 539.

Applicant for writ had to show that tribunal sought to be restrained was acting without, or in excess of, jurisdiction. Construction Securities Co. v. District Court of Third Judicial Dist. in and for Salt Lake County, 85 U. 346, 39 P. 2d 707.

Writ of prohibition issued to restrain district court from proceeding with inquisition of insanity of defendant condemned to death since court had no jurisdiction to suspend death sentence. State ex rel. Johnson v. Alexander, 87 U. 376, 49 P. 2d 408.

Writ preventive rather than remedial.

The writ of prohibition was preventive, and not remedial, in its nature, and therefore was the appropriate writ to arrest the unauthorized proceeding prior to the judgment, as well as after it, always, however, looking to the future and not to the past. People ex rel. Pierce v. Carrington, 5 U. 531, 17 P. 735.

The writ of prohibition was preventive rather than corrective, and issued only to prevent the commission of a future act, not to undo one already performed. It commanded a person to whom it was directed not to do something which, by the suggestion of the relator, the court was informed he was about to do. Martineau v. Crabbe, 46 U. 327, 150 P. 301; Sheriff of Salt Lake County v. Board of Comrs. of Salt Lake County, 71 U. 593, 268 P. 783.

(c) **Action by Attorney General Under Subdivision (b) (1) of this Rule.** The attorney general may, and when directed so to do by the governor shall, commence any action authorized by the provisions of subdivision (b) (1) of this Rule. Such action shall be brought in the name of the State of Utah.

Compiler's Notes.

There is no Fed. Rule covering the subject matter contained in this Rule.

Removal of officer for malfeasance.

Section 77-7-2 expressly authorizes the district attorney to bring an action under chapter 7 of Title 77 and this specific provision makes the general rules contained in Rules 65B(b)(1) and 65B(c) clearly inapplicable to an action to remove a city commissioner for malfeasance in office. State v. Geurts, 11 U. (2d) 345, 359 P. 2d 12, distinguished in 17 U. (2d) 190, 192, 407 P. 2d 571, 572.

Collateral References.

Quo Warranto⇐31, 33, 36.

74 C.J.S. Quo Warranto § 27.

65 Am. Jur. 2d 272 to 274, Quo Warranto §§ 61, 62.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A. L. R. 2d 789.

Conviction under federal law or law of another state or country, effect of on right to vote or hold public office, 39 A. L. R. 3d 303.

Conviction: what constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for public office, 71 A. L. R. 2d 593.

Corporation as necessary or proper party defendant in proceedings to determine validity of election or appointment of corporate director or officer, 21 A. L. R. 2d 1048.

Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision, 89 A. L. R. 2d 632.

Infamous crime or one involving moral turpitude constituting disqualification to hold public office, 52 A. L. R. 2d 1314.

Judge, power of court to remove or suspend, 53 A. L. R. 3d 882.

Misconduct during previous office, removal of public officer for, 42 A. L. R. 3d 691.

Offense under federal law or law of another state or country, conviction as vacating accused's holding of state or local office or as ground of removal, 20 A. L. R. 2d 732.

Power of district, county, or prosecuting attorney to bring action of quo warranto, 131 A. L. R. 1207.

Previous tenure of office, construction and effect of constitutional or statutory provisions disqualifying one for public office because of, 59 A. L. R. 2d 716.

Quo warranto as remedy in field of taxation, 109 A. L. R. 324.

Residency: validity of requirement that candidate or public officer have been resi-

dent of governmental unit for specified period, 65 A. L. R. 3d 1048.

Right of corporation to act as relator in information in the nature of quo warranto, 1 A. L. R. 197.

DECISIONS UNDER FORMER LAW

Refusal of attorney general to bring action.

One having special interest could request attorney general to bring an action of quo warranto upon his relation, and if attorney general refused to do so, respondent could then invoke aid of court, and if he could show that he had a special interest to protect, court could order attorney general to bring action upon his relation. State ex rel. Murdock v. Ryan, 41 U. 327, 125 P. 666.

Right to file information without leave of court.

Government officer had right, where proceedings were instituted without any relator, to file information without leave of court, but he could not prevent court from assuming jurisdiction by refusing to consent to use of his name when a private citizen was relator. State ex rel. Lloyd v. Elliott, 13 U. 200, 44 P. 248.

(d) **Action by Private Person Under Subdivision (b) (1) of this Rule.** A person claiming to be entitled to a public or private office unlawfully held and exercised by another may bring an action therefor. A private person may bring an action upon any other ground set forth in subdivision (b) (1) of this Rule, only if the attorney general fails to do so after notice. Any such action commenced by a private person shall be brought in his own name. Upon filing the complaint, such person shall also file an undertaking with sufficient sureties, in the same form required of bonds on appeal under the provision of Rule 73 and conditioned that such person will pay any judgment for costs or damages recovered against him in such action.

Compiler's Notes.

There is no Fed. Rule covering the subject matter contained in this Rule.

Collateral References.

Quo Warranto⇐34.
74 C.J.S. Quo Warranto § 28.
65 Am. Jur. 2d 274, Quo Warranto § 64.

Bonds: taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 A. L. R. 2d 448.

Default or consent judgment against principal, conclusiveness and effect, upon surety, of, 59 A. L. R. 2d 752.

Parties: corporation as necessary or proper party defendant in proceedings to determine validity of election or appointment of corporate director or officer, 21 A. L. R. 2d 1048.

Quo warranto: right of private person not claiming office to maintain quo warranto proceedings to test title to or existence of public office, 51 A. L. R. 2d 1306.

Sale of shares: validity of agreement in conjunction with sale of corporate shares that majority of directors will be replaced by purchaser's designees, 13 A. L. R. 3d 361.

Taxpayers' action, constitutionality, construction, and application of statutes requiring bond or security for costs and expenses in, 89 A. L. R. 2d 333.

Unsuccessful litigant's payment of costs as barring his right to appeal from judgment on merits, 39 A. L. R. 2d 194.

DECISIONS UNDER FORMER LAW

Action by private person.

The only condition under which private person could bring action in nature of quo warranto in name of the state was when he was claiming to be entitled to a public office unlawfully held and exercised by another. In that case he showed some special interest. A citizen could not interfere with state agencies without showing that he had some special interest which required protection. State ex rel. Murdock v. Ryan, 41 U. 327, 125 P. 666.

(e) **Nature and Extent of Relief Under Subdivision (b) (2) of this Rule.** Upon the filing of a complaint seeking relief under subdivision (b) (2) of this Rule, the court may require notice to be given to the adverse party before issuance of the writ, or may grant an order to show cause why such writ should not be issued, or may grant the writ without notice. If the writ is granted, it shall be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings, commanding such tribunal, board or officer to certify fully to the court issuing the writ, within a specified time, a transcript of the record and proceedings, describing or referring to them with sufficient certainty; and if a stay of proceedings is intended, requiring the party in the meantime to desist from further proceedings in the matter to be reviewed. The review by the court issuing the writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

Compiler's Notes.

There is no Fed. Rule covering the subject matter contained in this Rule.

Scope of review.

Ordinarily on writ of review the certified record alone is examinable. This is not true however, where the record and determination of the commission or board are unsupported by some kind of reasonably substantial proof. In such event the judiciary may awaken to question their warrant, and in doing so, may receive, examine and weigh evidence, if necessary to the end that due process guarantees will maintain. Denver & R. G. W. R. Co. v. Central Weber Sewer Improvement Dist., 4 U. (2d) 105, 287 P. 2d 884.

The nature and extent of the review depends on what happened below as reflected by a true record of the proceedings, viewed in the light of accepted due process requirements. If the record made revealed that the commission had conducted a hearing, taken evidence, heard witnesses under oath and otherwise had proceeded in accordance with such due process requirements, and had the facts either supported or negatived the commission's findings and conclusions, the reviewing court could have examined only the record before it, to determine if the commission regularly had pursued its authority, or had abused its discretion. Denver & R. G. W. R. Co. v. Central Weber Sewer Improvement Dist., 4 U. (2d) 105, 287 P. 2d 884.

Collateral References.

Quo Warranto⊂=46 et seq.
74 C.J.S. Quo Warranto § 36 et seq.
65 Am. Jur. 2d 292 et seq., Quo Warranto § 86 et seq.

Administrative decision, effect of court review of, 79 A. L. R. 2d 1141.

Arbitration: disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion, or fraud of arbitrators, 65 A. L. R. 2d 755.

Continuance in case before quasi-judicial officer or board, counsel's absence because of attendance on legislature as ground for, 49 A. L. R. 2d 1073.

Reopening decision: power of administrative agency to reopen and reconsider final decision as affected by lack of specific statutory authority, 73 A. L. R. 2d 939.

Stare decisis doctrine as applicable to decisions of administrative agencies, 79 A. L. R. 2d 1126.

State, or its agency or board, liability of for costs of appeal in civil action to which it is a party, 72 A. L. R. 2d 1379.

Stay of civil proceedings pending determination of action in fe[illegible]al court in same state, 56 A. L. R. 2d [illegible].

DECISIONS UNDER FORMER LAW

Contents and sufficiency of affidavit.

In certiorari to review action of a justice for failure to fix a date for the trial and notify the parties thereof, the affidavit for the writ should have averred that the justice proceeded to trial without fixing the day of trial and notifying the parties thereof; where affidavit merely stated that justice in rendering judgment exceeded his jurisdiction, without specifying in what particular he did so, it stated a mere conclusion and the proceedings

of jurisdiction. Such rulings were reviewable by appeal. Herald-Republican Publishing Co. v. Lewis, 42 U. 188, 129 P. 624, following Rohwer v. District Court of First Judicial Dist., 41 U. 279, 125 P. 671.

Supreme Court could not, on certiorari, examine trial court's findings to determine whether such findings supported the decree or judgment. Pincock v. Kimball, 64 U. 4, 228 P. 221.

Writ of review extended no further than to determine whether the inferior court or tribunal exceeded its jurisdiction by want of jurisdiction of the parties or of the subject matter. Pincock v. Kimball, 64 U. 4, 228 P. 221, overruling Gilbert v. Board of Police & Fire Comrs. of Salt Lake City, 11 U. 378, 40 P. 264, and Salt Lake City Water & Electrical Power Co. v. City of Salt Lake City, 24 U. 282, 67 P. 791.

In certiorari proceeding to review order releasing property from attachment, Supreme Court could not determine whether property was that of defendant or his wife or whether such property was exempt from attachment. Hilton Bros. Motor Co. v. District Court in and for Millard County, 82 U. 372, 25 P. 2d 595.

Where application for writ of prohibition was treated as an application for writ of certiorari or writ of review, court was limited to a determination whether there had been a failure or excess of jurisdiction, just as in case of an application for a writ of prohibition. State ex rel. Welling v. Third Judicial District Court in and for Salt Lake County, 87 U. 416, 49 P. 2d 950.

Discretion of trial court to entertain a motion or application for a new trial in furtherance of justice, made within a reasonable time and before expiration of six months, would not be disturbed in certiorari. Lund v. Third Judicial District Court in and for Salt Lake County, 90 U. 433, 62 P. 2d 278.

On writ of certiorari Supreme Court would not consider claims not made below with respect to insufficiency of perfection of appeal from justice court to district court. Function of writ was to review question of whether inferior tribunal acted without or in excess of its jurisdiction; it would not issue to review mere error. State v. Salmon, 90 U. 512, 62 P. 2d 1315.

Fact that unauthorized person represented the state in prosecution before justice of the peace was a mere error which could not properly be reviewed in a certiorari proceeding. State v. Salmon, 90 U. 512, 62 P. 2d 1315.

Defense of statute of limitations could not be raised for the first time in the Supreme Court on review by certiorari of workmen's compensation award. Ogden City Corp. v. Industrial Comm., 92 U. 423, 69 P. 2d 261.

(f) **Habeas Corpus.** Appropriate relief by habeas corpus proceedings shall be granted whenever it appears to the proper court that any person is unjustly imprisoned or otherwise restrained of his liberty. If the person seeking relief is imprisoned in the penitentiary and asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or under the Constitution of the State of Utah, or both, then the person seeking such relief shall proceed in accordance with Rule 65B(i). In all other cases, proceedings under this subdivision shall be conducted in accordance with the following provisions:

Compiler's Notes.

The introductory paragraph of Rule 65B(f) was amended by the Supreme Court effective August 20, 1969. Prior to amendment the paragraph read: "Appropriate relief shall also be granted whenever it appears to the proper court that any person is unjustly imprisoned or restrained of his liberty. Proceedings under this subdivision shall be subject to the following conditions." Subdivisions (1) through (8) remain the same.

Federal Rule 81(a)(2) applies the Fed. Rules to proceedings for habeas corpus. There is no Fed. Rule covering the subject matter contained in Rule 65B(f) except as described following subds. (3) and (7) below.

Burden of proof.

Burden was on convicted plaintiff in habeas corpus proceeding to show that he was improperly detained, since after conviction the presumption changes in favor of the regularity of the proceedings and the judgment. Larrabee v. Turner, 25 U. (2d) 248, 480 P. 2d 134.

Purpose and office of writ.

Habeas corpus is not to be used to re-

service as having been obtained by fraud or trickery, 98 A. L. R. 2d 600.

Sexual psychopaths, habeas corpus to test validity of confinement under statutes relating to, 24 A. L. R. 2d 376.

Speedy trial: waiver or loss of accused's right to speedy trial as affecting right to habeas corpus, 57 A. L. R. 2d 339.

Subsequent proceedings: discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings, 33 A. L. R. 3d 1443.

Sufficiency of indictment or information as regards the offense sought to be charged, habeas corpus to test, 57 A. L. R. 85.

Law Reviews.

Post Conviction Procedure Act: Limitation on Habeus Corpus? 1969 Utah L. Rev. 595.

DECISIONS UNDER FORMER LAW

Nature of proceeding.

Habeas corpus proceedings were civil, and not criminal. Winnovich v. Emery, 33 U. 345, 93 P. 988; State v. Kelsey, 64 U. 377, 231 P. 122.

Habeas corpus proceeding was special proceeding. Winnovich v. Emery, 33 U. 345, 93 P. 988.

Proceeding in habeas corpus was civil; applicant was plaintiff and party who restrained applicant was the defendant, and appeal by defendant was not attempted appeal by state. Winnovich v. Emery, 33 U. 345, 93 P. 988.

(1) The complaint seeking relief shall, among other things, state that the person designated is illegally restrained of his liberty by the defendant and the place where he is so restrained, if known (stating wherein and the cause or pretense thereof, according to the best information of the plaintiff, annexing a copy of any legal process or giving a satisfactory explanation for failing so to do); that the legality of the imprisonment or restraint has not already been adjudged upon a prior proceeding; whether another complaint for the same relief has been filed and relief thereunder denied by any court, and if so attaching a copy of such complaint and stating the reasons for the denial of relief or giving satisfactory reasons for the failure to do so.

Custody of children.

A natural mother was entitled to have her children restored to her where she had not given legal consent to an adoption, and had notified the adoptive parents that she wished to retake the children in accordance with the parties' oral agreement, as soon as she had regained her health, where the adoptive parents ignored her request and a month later procured a purported final adoption decree without notice to the natural mother, and where the natural mother promptly thereafter filed an affidavit stating under what circumstances the children had been obtained, and, within six weeks from the time the decree was signed, sued out an order for a writ of habeas corpus. Taylor v. Waddoups, 121 U. 279, 241 P. 2d 157.

Extradition.

Plaintiff was entitled to release in habeas corpus proceedings prior to execution of extradition, since Utah did not produce any means of identifying him except his first and last name, and it was alleged that there was at least four persons in the Salt Lake area with the same first and last names. Madsen v. Larsen, 527 P. 2d 227.

Habeas corpus in general.

Habeas corpus will not lie for the release of a prisoner because at his trial the verdict was received by a judge other than the one who had presided over the preceding stages of the trial. Any error, if committed, did not go to the jurisdiction of the court or render the judgment void. Forrest v. Graham, 123 U. 591, 261 P. 2d 169.

Purpose of Rule.

The obvious purpose of this Rule is to discourage successive applications based upon the same grounds and that the courts need not entertain them. Burleigh v. Turner, 15 U. (2d) 118, 388 P. 2d 412.

Res judicata.

The doctrine of res judicata is applicable to habeas corpus proceedings under

corpus proceeding was legality of the restraint, where such proceedings were brought for custody of children, inquiry extended far beyond the ordinary inquiry, since proceeding was one which was equitable in highest degree. Jones v. Moore, 61 U. 383, 213 P. 191.

Writ was available to parent to obtain discharge of child held in custody of probation officer as juvenile delinquent in irregular proceedings beyond jurisdiction of juvenile court. Cooke v. Cooke, 67 U. 371, 248 P. 83.

In habeas corpus proceeding it was held that father of four-year-old child whose mother died at birth was entitled to custody as against persons with whom he had boarded it, though he had no home of his own, he being morally fit and able to provide for child in town where he worked, and thus have companionship of growing child. Sherry v. Doyle, 68 U. 74, 249 P. 250, 48 A. L. R. 131.

Purpose and office of writ.

Mere errors of construction or judgment, whether committed by court or by some board or officer, could not be reviewed in habeas corpus proceeding. Bleon v. Emery, 60 U. 582, 209 P. 627.

Habeas corpus took cognizance only of defects of a jurisdictional character which rendered proceedings not merely voidable, but void, so that question of sufficiency of complaint in proceeding to place person under security to keep peace could not be inquired into in habeas corpus proceeding. Areson v. Pincock, 62 U. 527, 220 P. 503.

Right to discharge.

If judgment or order committing petitioner was beyond the court's jurisdiction and not mere error or irregularity, he was entitled to absolute discharge on habeas corpus. Frankey v. Patten, 75 U. 231, 284 P. 318.

Substitute for appeal.

Writ could not be made to serve purposes of appeal. Ex parte Hays, 15 U. 77, 47 P. 612.

After trial and conviction, sufficiency of the complaint could not be reviewed on habeas corpus for mere errors and irregularities; this had to be done by appeal. Habeas corpus took cognizance only of defects of a jurisdictional character. Bruce v. East, 43 U. 327, 134 P. 1175.

(2) The complaint shall be filed in the court most convenient to the plaintiff.

Collateral References.

Habeas Corpus⊂=41 et seq.
39A C.J.S. Habeas Corpus § 165.
39 Am. Jur. 2d 265, Habeas Corpus § 120.

(3) Upon the filing of the complaint the court shall, unless it appears from such complaint or the showing of the plaintiff that he is not entitled to any relief, issue a writ directed to the defendant commanding him to bring the person alleged to be restrained before the court at a time and place therein specified, at which time the court shall proceed in a summary manner to hear the matter and render judgment accordingly. If the writ is not issued the court shall state its reasons therefor in writing and file the same with the complaint, and shall deliver a copy thereof to the plaintiff.

Compiler's Notes.

Federal Rule 81(a)(2) provides that the writ of habeas corpus shall be directed to the person having custody of the person detained.

Burden of Proof.

In petition for writ of habeas corpus it was the duty of the petitioner to present convincing evidence that he was wrongfully incarcerated. Farrow v. Smith, 541 P. 2d 1107.

Right to hearing.

Rule contemplates that if hearing is held, party seeking relief is entitled to be present, so that court erred in proceeding in summary manner to hold hearing in absence of party and his counsel. Stinnett v. Turner, 20 U. (2d) 148, 434 P. 2d 753, distinguished in 23 U. (2d) 303, 305, 462 P. 2d 705, 706.

Written reasons for refusal.

Requirement that reasons for refusal of writ be in writing is intended to be of assistance to both petitioner and judge if

petitioner seeks recovery of forfeiture under 78-35-1. Farrell v. Turner, 25 U. (2d) 351, 482 P. 2d 117.

Collateral References.

Habeas Corpus⇐59 et seq.
39A C.J.S. Habeas Corpus § 171 et seq.
39 Am. Jur. 2d 269 et seq., Habeas Corpus § 129 et seq.

Bar of limitations as proper subject of investigation in extradition proceedings or in habeas corpus proceedings for release of one sought to be extradited, 77 A. L. R. 902.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 40 A. L. R. 2d 1151.

Former jeopardy as ground for habeas corpus, 8 A. L. R. 2d 285.

Right of state or public officer to appeal from an order in habeas corpus releasing one from custody, 30 A. L. R. 1322.

DECISIONS UNDER FORMER LAW

Issues triable.

An issue of former conviction could not be tried on habeas corpus in the Supreme Court. In re Barton, 6 U. 264, 21 P. 998.

Summary hearing.

Object of writ was that the right to a discharge could in a summary manner be at once determined. In re Clasby, 3 U. 183, 1 P. 852.

The right of plaintiff to be promptly heard and to be discharged if illegally held was of very essence of proceeding. In re Clasby, 3 U. 183, 1 P. 852.

Provision for summary hearing did not authorize court to stay judgment of unconditional discharge and to remand petitioner to custody pending appeal. Dickson v. Mullings, 66 U. 282, 241 P. 840, 43 A. L. R. 136.

(4) If the defendant cannot be found, or if he does not have such person in custody, the writ (and any other process issued) may be served upon any one having such person in custody, in the manner and with the same effect as if he had been made defendant in the action.

Collateral References.

Habeas Corpus⇐67.
39A C.J.S. Habeas Corpus § 177.
39 Am. Jur. 2d 271, 272, Habeas Corpus §§ 132, 133.

(5) If the defendant conceals himself, or refuses admittance to the person attempting to serve the writ, or if he attempts wrongfully to carry the person imprisoned or restrained out of the county or state after service of the writ, the person serving the writ shall immediately arrest the defendant, or other person so resisting, and bring him, together with the person designated in the writ, forthwith before the court before which the writ is made returnable.

Collateral References.

Habeas Corpus⇐81.
39A C.J.S. Habeas Corpus § 187.
39 Am. Jur. 2d 305, Habeas Corpus §§ 176, 177.

(6) At the time of the issuance of the writ, the court may, if it appears that the person designated will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the writ can be enforced, cause a warrant to issue, reciting the facts, and directing the sheriff to take such person and forthwith bring him before the court to be dealt with according to law.

Collateral References.

Habeas Corpus⇐71, 82.
39A C.J.S. Habeas Corpus § 185.
39 Am. Jur. 2d 277, 278, Habeas Corpus §§ 144, 145.

(7) The defendant shall appear at the proper time and place with the person designated or show good cause for not doing so and must answer the complaint within the time allowed. The answer must state plainly and unequivocally whether he then has, or at any time has had, the person designated under his control and restraint, and if so, the cause thereof. If such person has been transferred, the defendant must state that fact, and to whom, when the transfer was made, and the reason or authority therefor. The writ shall not be disobeyed for any defect of form or misdescription of the person restrained or defendant, if enough is stated to show the meaning and intent thereof.

Compiler's Notes.

Federal Rule 81(a)(2) requires a return within three days, but up to forty days may be allowed in state custody cases where a federal remedy is sought, and up to twenty days may be allowed in other federal cases.

Collateral References.

Habeas Corpus⇐73½ et seq.

39A C.J.S. Habeas Corpus §§ 180, 181.

39 Am. Jur. 2d 272 et seq., Habeas Corpus § 135 et seq.

Liability of judge, court, administrative officer, or other custodian of person for whose release the writ is sought, in connection with habeas corpus proceedings, 84 A. L. R. 807.

DECISIONS UNDER FORMER LAW

Demurrer to petition.

Facts alleged in petition were admitted by demurrer. Nickolopolous v. Emery, 59 U. 588, 206 P. 284.

(8) The person restrained may waive his right to be present at the hearing, in which case the writ shall be modified accordingly. Pending a determination of the matter the court may place such person in the custody of such individual or individuals as may be deemed proper.

Collateral References.

Habeas Corpus⇐71, 82.

39A C.J.S. Habeas Corpus § 185.

39 Am. Jur. 2d 277, 278, Habeas Corpus §§ 144, 145.

(g) **Proceedings Where Relief Sought in Supreme Court.** If the complaint seeking relief is filed in the Supreme Court, that court may order the writ returnable either before it or before any district court. If the taking of any evidence is necessary for a determination of the matter, the Supreme Court may refer the matter to a district court or to a master under the provisions of these Rules, for a hearing of such facts as may be necessary.

Compiler's Notes.

There is no Fed. Rule covering the sub ject matter contained in this Rule.

Collateral References.

Courts⇐206, 207, 248; Habeas Corpus ⇐44, 46, 47; Mandamus⇐141; Prohibition⇐16; Quo Warranto⇐27.

21 C.J.S. Courts §§ 311, 312, 465; 39 C.J.S. Habeas Corpus § 142; 55 C.J.S. Mandamus § 240; 73 C.J.S. Prohibition § 18; 74 C.J.S. Quo Warranto § 24.

26 Am Jur. 2d 467 to 469, Courts §§ 108 to 110; 39 Am. Jur. 2d 255, Habeas Corpus § 108; 52 Am. Jur. 2d 347 et seq., Mandamus § 21 et seq.; 63 Am. Jur. 2d 268, Prohibition § 37; 65 Am. Jur. 2d 320 et seq., Quo Warranto § 127 et seq.

Return: civil liability of one making false or fraudulent return of process, 31 A. L. R. 3d 1393.

Return: failure to make return as affecting validity of service or court's jurisdiction, 82 A. L. R. 2d 668.

DECISIONS UNDER FORMER LAW

Effect of demurrer in district court.

When, upon application to Supreme Court for an alternative writ, the question presented to that court must turn upon the facts that were admitted by the demurrer in the district court, and the sole question was whether, upon the conceded facts, the judgment of the district court should not have been in favor of application, then defendant could not, for first time, deny in Supreme Court the truth of the facts which were admitted in district court and upon which that court entered judgment. Defendant had to stand or fall upon demurrer filed in district court. If defendant desired to raise an issue of fact, he should file answer in district court. Ketchum Coal Co. v. Christensen, 48 U. 214, 159 P. 541.

Jurisdiction of Supreme Court.

Supreme Court will not assume jurisdiction at relation of a private person, except in cases which presented some special reason or some special or peculiar emergency, or where the interests of the state at large were shown to be such as to render it apparent that the interests of justice required its exercise. State ex rel. Lloyd v. Elliott, 13 U. 200, 44 P. 248.

Supreme Court had original concurrent jurisdiction with district court in habeas corpus proceedings. Bell v. Corless, 57 U. 604, 196 P. 568.

(h) **When Writ Returnable.** Any alternative writ issued by a court or a judge thereof, may be made returnable, and a hearing thereon may be had, at any time as such court may in its discretion determine.

Compiler's Notes.

In the case of a writ of habeas corpus, or order to show cause, Fed. Rule 81(a)(2) requires a return within three days, but up to forty days may be allowed in state custody cases where a federal remedy is sought, and up to twenty days may be allowed in other federal cases.

Collateral References.

Habeas Corpus⇐73½ et seq., 90; Mandamus⇐164, 170; Prohibition⇐26, 29; Quo Warranto⇐50, 58.

39A C.J.S. Habeas Corpus §§ 180, 209; 55 C.J.S. Mandamus §§ 319, 332; 73 C.J.S. Prohibition §§ 29, 36; 74 C.J.S. Quo Warranto §§ 38, 44.

39 Am. Jur. 2d 273, 275, Habeas Corpus §§ 136, 142; 52 Am. Jur. 2d 756, 780, Mandamus §§ 432, 460; 63 Am. Jur. 2d 276 to 279, Prohibition §§ 45, 46; 65 Am. Jur. 2d 259, 308, Quo Warranto §§ 91, 108.

(i) **Postconviction Hearings.**

(1) Any person imprisoned in the penitentiary or county jail under a commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the State of Utah, or both, may institute a proceeding under this Rule.

Such proceedings shall be commenced by filing a complaint, together with a copy thereof, with the clerk of the court in which such relief is sought. The complainant shall also serve a copy of the complaint so filed upon the attorney general of the State of Utah if imprisoned in the state prison, or the county attorney of the county where imprisoned if in a county jail. Such service may be made by any of the methods provided for service in Rule 4 of the Utah Rules of Civil Procedure, or by mailing such copy to the attorney general or county attorney by United States mail, postage prepaid, and by filing with the clerk of said court a certificate of mailing certifying under oath that a copy was so mailed to the attorney general or county attorney. Upon the filing of such a complaint, the clerk shall promptly bring the same to the attention of the presiding judge of the court in which such complaint is filed.

(2) The complaint shall state that the person seeking relief is illegally restrained of his liberty by the defendant; shall state the place where he is so restrained; shall state the dates of and identify the proceedings in which the complainant was convicted and by which he was subsequently confined and of which he now complains; and shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated. The complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations, or shall state why the same are not attached.

The complaint shall also state whether or not the judgment of conviction that resulted in the confinement complained of has been reviewed on appeal, and if so, shall identify such appellate proceedings and state the results thereof.

The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceeding; and if the complainant shall have instituted prior similar proceedings in any court, state or federal, within the State of Utah, he shall so state in his complaint, shall attach a copy of any pleading filed in such court by him to his complaint, and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this Rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint, giving written notice thereof by mail to the complainant, and no further proceedings shall be had on such complaint.

(3) Argument, citations and discussion of authorities shall not be set forth in the complaint, but may be set out in a separate supporting memorandum or brief if the complainant so desires.

(4) All claims of the denial of any of complainant's constitutional rights shall be raised in the postconviction proceeding brought under this Rule and may not be raised in another subsequent proceeding except for good cause shown therein.

(5) If the complainant is not represented by counsel when the complaint is filed, he shall advise the court upon filing his complaint whether he intends to employ his own counsel, and if he does not do so, or if he requests the court to appoint counsel, the presiding judge shall forthwith appoint counsel to represent complainant and shall give notice to the complainant and the attorney general or county attorney of such appointment.

(6) Within ten days after service of a copy of the complaint upon him, the attorney general, or the county attorney, as the case may be, shall answer the complaint or otherwise plead thereto. Any further pleadings or amendments shall be in conformity with the Utah Rules of Civil Procedure.

(7) When an answer is filed, the court shall immediately set the case for a hearing within twenty days thereafter unless the court in its

discretion determines that further time is needed. Prior to the hearing, the state or county shall obtain such transcript of proceedings or court records as may be relevant and material to the case. The court, on its own motion, or upon the request of either party, may order a prehearing conference if good reason exists therefor; but such conference shall not be set so as to unreasonably delay the hearing on the merits of the complaint. The complainant shall be brought before the court for any hearing or conference.

If the court in which the complaint is filed determines that in the interest of convenience and economy, the hearing should be transferred to the district court having jurisdiction over the place of confinement of complainant, the court may enter a written order transferring such case and shall set forth in such order its reasons for so doing.

(8) In each case, the court, upon determining the case, shall enter specific findings of fact and conclusions of law and judgment, in writing, and the same shall be made a part of the record in the case.

If the court finds in favor of the complainant, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such further orders with respect to rearraignment, retrial, custody, bail or discharge as the court may deem just and proper in the case.

(9) If the complainant is unable to pay the costs of the proceedings, he may proceed in forma pauperis upon the filing of an affidavit to that effect, in which event the court may direct the costs to be paid by the county in which he was originally charged.

(10) Any final judgment entered upon such complaint may be appealed to and reviewed by the Supreme Court of Utah as an appeal in civil cases.

Compiler's Notes.

Rule 65B(i) was adopted by the Supreme Court effective August 20, 1969.

The federal statute governing remedies on motion attacking sentence appears at 28 U.S.C. § 2255.

Collateral References.

Criminal Law⇐1186.

24B C.J.S. Criminal Law § 1947 et seq.

21 Am. Jur. 2d 266, Criminal Law § 227.

Absence of convicted defendant during hearing or argument of motion for new trial or in arrest of judgment, 69 A. L. R. 2d 835.

Advising accused: violation of due process by failure of court to inform accused who is not represented by counsel of his right not to testify, 79 A. L. R. 2d 643.

Alcohol test: admission in criminal case of evidence that accused refused to submit to scientific test to determine amount of alcohol in system, as unlawful search or seizure, 87 A. L. R. 2d 378.

Apparel: pretrial requirement that suspect or accused wear or try on particular apparel as violating constitutional rights, 18 A. L. R. 2d 796.

Appeal, right of indigent defendant in criminal case to aid of state as regards, 55 A. L. R. 2d 1072.

Assistance of counsel, duty to advise accused as to right to, 3 A. L. R. 2d 1003.

Blood grouping tests as violation of privilege against unreasonable search and seizure, 46 A. L. R. 2d 1016.

Bribery in athletic contest, due process under statute as to, 49 A. L. R. 2d 1235.

Contempt: right to counsel in contempt proceedings, 52 A. L. R. 3d 1002.

Counsel, calling accused's counsel as a prosecution witness as improper deprivation of right to, 88 A. L. R. 2d 796.

Counsel chosen by accused, incompetency of, as affecting validity of conviction, 74 A. L. R. 2d 1390.

Cross-examination: court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant as violating due process of law in denying the right to be confronted by or to cross-examine adverse witnesses, 96 A. L. R. 2d 796.

Addendum C

▷
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Troy **REES**, Defendant and Appellant.

No. 991078-CA.

Feb. 1, 2001.

H. Don Sharp, Ogden, for appellant.

Mark L. Shurtleff and Marian Decker, Salt Lake City, for appellee.

Before JACKSON, ORME, and THORNE, JJ.

MEMORANDUM DECISION

JACKSON

***1** Rees first challenges the trial court's ruling on his motion to suppress evidence. The record shows the trial court relied on evidence presented in the preliminary hearing to decide the suppression issue. However, Rees failed to incorporate the preliminary hearing transcript, the suppression hearing transcript, and the affidavit in support of the search warrant into the record. A complete record is essential in this case because "issues presented in search and seizure cases are highly fact sensitive." *State v Lovegreen,* 798 P.2d 767, 770 (Utah Ct App.1990) Because some transcripts were not included in the record, we are unable to review pertinent factual findings by the trial court in our evaluation of whether someone had the authority to consent to a search. "In the absence of an adequate record on appeal, we cannot address the issues raised and [we] presume the correctness of the disposition made by the trial court." *State v Rawlings,* 829 P .2d 150, 152-53 (Utah Ct App.1992); *see also* Utah R.App.P. 11(e)(2). [FN1]

FN1. We note that Rees did not file a reply brief. The State's brief argues several procedural failures which Rees did not address in his opening brief. Absent a reply brief, the State's characterization of the record and the important nature of the omitted transcripts stands unchallenged.

Next, Rees challenges the trial court's finding that he possessed marijuana with intent to distribute. To successfully challenge a trial court's factual finding, Rees must first marshal the evidence in support of the finding and then show why that evidence is legally insufficient to support the finding. *See* Utah R.App.P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). Rees has failed to marshal the evidence, instead he only points to the evidence contrary to the trial court's ruling. *See State v Decorso,* 1999 UT 57, ¶ 41, 993 P.2d 837. Thus, we affirm the trial court's finding. *See id*

Finally, Rees contends the trial court dismissed the case after witnesses for the State failed to appear at two scheduled preliminary hearings, and the trial court should not have allowed the State to refile charges without presenting new evidence. However, the record does not bear out Rees's assertions. First, the record does not show that the case was dismissed and charges were refiled. Second, the record shows that the scheduled April 1, 1999 preliminary hearing was continued at Rees's request so that Judge Baldwin could hear the case. The April 8, 1999 preliminary hearing was also continued at Rees's request. Because Rees has failed to provide an adequate record to support his contentions on appeal, we presume the correctness of the trial court's rulings. *See Rawlings,* 829 P 2d at 152-53.

Affirmed.

ORME and THORNE, Judges, concur.

2001 WL 311418 (Utah App.), 2001 UT App 27

END OF DOCUMENT

Addendum D

H DON SHARP, # 2922
Attorney for Defendant -Petitioner
Key Bank Building, Suite 200
2491 Washington Blvd.
Ogden, Utah 84401
Tele: (801) 621-1567

DISTRICT COURT-STATE OF UTAH

WEBER COUNTY-OGDEN DEPARTMENT

STATE OF UTAH,	/	PETITION FOR EXTRAORDINARY RELIEF
Plaintiff/Respondent,	/	
Vs.	/	Case No. 991900480
TROY REES,	/	JUDGE: PARLEY BALDWIN
Defendant/Petitioner.	/	

COMES NOW, Troy Rees, the above named Defendant/Petitioner, by and through his attorney H. Don Sharp and hereby petitions this Court for Extraordinary Relief under the provisions of Rule 65B (a)(b).

The reason for requesting extraordinary relief is that the Defendant's appeal was denied for the failure of certain transcripts having not been filed with the Court of Appeals. These transcripts had been timely ordered, paid for and were on file with the Clerk of the District Court but were not filed with the rest of the record. This was through no fault of the Defendant/Petitioner, but the Defendant/Petitioner is restrained by the 45 day jail sentence pending if he is not granted the relief requested herein.

STATEMENT OF FACTS

1 The defendant was convicted of Possession of Marijuana with intent to Distribute (A third Degree Felony) and an accompanying Possession of Paraphernalia and Class B Misdemeanor and sentenced on the 2nd day of December, 1999

2. Included in the sentence was a jail term of 45 days which was stayed pending appeal.

3 The appeal was timely filed and transcripts of all relevant proceedings (Preliminary Hearing, Suppression Hearing, and Trial) were ordered, paid for and filed with the Court.

4 Defendant's Appellant Brief was timely filed.

5 The State's Reply Brief was filed.

6 The State argued in its reply brief that appellate record (Preliminary Hearing and Suppression Hearing Transcripts) was not complete.

7 Defendant's counsel, upon receipt of the State's Brief glanced at the three Arguments set out on the Table of Contents page of the Brief and obviously did not pick up on the defect in the record.

8. The State did not inquire of Defendant's attorney as to the whereabouts of the Transcripts.

9 The Court of Appeals dismissed the Appeal on the insufficient record.

10 After receipt of the Court of Appeals decision defendant's counsel contacted Fran Lund, of the District Court Clerks office to see if the transcripts were on file. After she looked for them the transcripts of the Preliminary Hearing and

Suppression Hearing were located, but they had been filed on a different shelf than the rest of the record. She confirmed at that time that the transcripts had not been filed.

11. The defendant was unaware of the above problems in his appeal, and was not responsible for the dismissal.

12. There are important legal and factual issues that should be reviewed in this case and under the circumstances the defendant has been denied his right to appeal through no fault of his own.

13. The only remedy for this type of Problem is threw a Petition for Extraordinary Relief under Rule 65B of the Utah Rules of Civil Procedure. State v. Johnson, 635 P.2d 36 (1981)

WHEREFORE, Petitioner prays for relief as follows:

1. That the Court hold an evidentiary if necessary to determine if the Defendant has been denied his Constitutional right to appeal and that the denial was no fault of the Defendant/Petitioner.
2. Upon a finding of a denial of the right to appeal through no fault of the defendant to re-sentence the defendant and allow the appeal to be refiled.

Dated this 9th day of May, 2001

H. DON SHARP, ATTORNEY FOR PETITIONER

Copy Received 5/9/01
DATE

Marsha Wold

Addendum E

SECOND DISTRICT COURT - OGDEN
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH vs. TROY REES

CASE NUMBER 991900480 State Felony

CHARGES

Charge 1 - 58-37-8(1AIV) - POSS W/INTENT TO DIST C/SUBSTANCE
3rd Degree Felony Plea: October 21, 1999 Not Guilty
Disposition: October 21, 1999 Guilty

CURRENT ASSIGNED JUDGE

PARLEY R. BALDWIN

PARTIES

Plaintiff - STATE OF UTAH
Represented by: CAMILLE L. NEIDER

Defendant - TROY REES
PLEASANT VIEW, UT 84414
Represented by: H DON SHARP

DEFENDANT INFORMATION

Defendant Name: TROY REES
Offense tracking number: 8180903
Date of Birth: January 13, 1964
Law Enforcement Agency: WEBER MORGAN STRIKE
Prosecuting Agency: WEBER COUNTY
Citation Number: 99-0243F
Violation Date: August 07, 1998 WEBER COUNTY

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	1,576.22
	Amount Paid:	416.50
	Credit:	1,159.72
	Balance:	0.00
TRUST TOTALS	Trust Due:	580.00
	Amount Paid:	580.00
	Credit:	0.00
	Trust Balance Due:	0.00
	Balance Payable:	0.00

REVENUE DETAIL - TYPE: FINE

Amount Due:	1,000.00
Amount Paid:	0.00

Ogden, UT 84401
Before Judge: PARLEY R. BALDWIN
05-09-01 Filed: PETITION FOR EXTRAORDINARY RELIEF
05-10-01 Minute Entry - Minutes for MOTION HEARING
Judge: PARLEY R. BALDWIN
PRESENT
Clerk: debbiew
Prosecutor: NEIDER, CAMILLE L.
Defendant
Defendant's Attorney(s): SHARP, H. DON

Video
Tape Number: B051001 Tape Count: 9;27

HEARING

This is time set for motion hearing on the motion for extraordinary relief. Hearing not held. State objects to the motion filed as the case has already been adjudicated in the Court of Appeals.
Court dismisses the petition and finds that the case has been adjudicated in the Court of Appeals. Court imposes the original sentence and imposes the original 45 days jail.
Court allows the defendant to be released for work through the Kiesel facility in lieu of the jail diversion facility. All other terms of probation are reaffirmed.
06-07-01 Filed: NOTICE OF APPEAL
06-15-01 Filed: LETTER FROM COURT OF APPEALS #20010490-CA
07-05-01 REVIEW OF SENTENCE scheduled on July 12, 2001 at 09:00 AM in 3rd Floor Southwest with Judge BALDWIN.
07-06-01 Fee Account created Total Due: 25.00
07-06-01 REPORTER FEES Payment Received: 25.00
Note: REPORTER FEES; Mail Payment;
07-12-01 Minute Entry - Minutes for REVIEW OF SENTENCE
Judge: PARLEY R. BALDWIN
PRESENT
Clerk: debbiew
Prosecutor: CORP, SANDRA L.

CASE NUMBER 991900480 State Felony

Defendant
Defendant's Attorney(s): SHARP, H. DON

Video
Tape Number: B071201 Tape Count: 9:22

HEARING

This is time set for review of sentence. Court imposes the original sentence of formal probation and grants the request for a new evaluation to be completed by Adult Probation & Parole for substance abuse treatment.

Addendum F

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff and Appellee	:	Case No. 20010490
	:	
-VS-	:	
TROY REES,	:	
Defendant and Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE SUMMARY DISMISSAL OF A MOTION FOR EXTRAORDINARY RELIEF FILED UNDER RULE 65B (a)(b). HON. PARLEY BALDWIN PRESIDING.

MARK L. SHURTLEFF
Attorney General
J. FREDRIC VOROS, JR.
Assistant Attorney General
160 East 300 South
Salt Lake City, Utah 84114
Telephone: (801) 366-0300
Attorney for Appellee

H. DON SHARP #2922
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Ogden, Utah 84401
Telephone: (801) 621-1567
Attorney for Appellant

TABLE OF CONTENT

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff and Appellee,	:	
vs-	:	Case No. 20010490
TROY REES,	:	
Defendant and Appellant	:	

JURISDICTION OF THE COURT OF APPEALS

This appeal is from a summary dismissal of the Defendant's Motion for Extraordinary Relief under Rule 65B.

The Court has jurisdiction to hear this appeal by virtue of 78-2a-3(2)(f).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The District Court entered a summary dismissal of the Defendant's Petition for Extraordinary Relief under Rule 65B, based on the Conclusion that the issue had been "adjudicated" in the Court of Appeals. The Court of Appeals presumed the correctness of the rulings at trial on the basis of an inadequate record on appeal. The appeal was not decided on the merits, as relates to Points 1 and 2 of Appellant's Brief, through no fault of the defendant.

The issue before this Court if the Trial Court committed err in not considering the defendant's lack of fault in a procedural defect in the appeal process.

The Standard for review is for correctness. *State v. Rawlings*, 829 P.2d 150, at152.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UTAH COURT RULES ANNOTATED 2001—UTAH RULES OF APPELLATE PROCEDURE - RULE 11(c)

> "*Duty of appellant.* After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted."

UTAH COURT RULES ANNOTATED 2001—UTAH RULES OF APPELLATE PROCEDURE—RULE 12

> (b) *Transmittal of record on appeal to appellate court; duty of trial court clerk.*
> (1) *Duty of trial court clerk in criminal cases.* In criminal cases, the record will be transmitted by the clerk of the court to the clerk of the appellate court upon completion of the transcript under (a) above or, it there is no transcript, within 20 days of the filing of the notice of appeal.

UTAH COURT RULES ANNOTATED 2001—UTAH RULES OF CIVIL PROCEDURE—RULE 65B(b)(5)

> *Dismissal of frivolous claims.* On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order need not state findings of fact or conclusions of law. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

STATEMENT OF THE CASE

Nature of the case, course and disposition below

The defendant was convicted of Possession of Marijuana with Intent to Distribute and sentenced on the 2nd of December, 1999. The trial court granted a Certificate of Probable Cause and an appeal was filed. All transcripts were prepared and paid for and the Defendant/Appellant's Brief was timely filed. The

State's reply was also timely filed. The appellant's attorney complied with the requirements of Rule 11(c) of the Utah Rules of Appellate Procedure. Although the transcripts of the Preliminary Hearing and the Suppression Hearing were on file with the Clerk of the court, the clerks office failed to file them with the rest of the record.

The Court of Appeals did not address the issues in Points 1 & 2 of the Appellant's Brief on the grounds that since the transcripts of the Preliminary Hearing and the Suppression Hearing had not been filed, the court was therefore bound by its decision in *State v. Rawlings*, 829 P.2d 150, (1992). Defendant/Appellant's counsel should have, but unfortunately did not realize the procedural defect until after the Court of Appeals rendered its Memorandum Decision (Case No. 991078-CA).

Counsel then filed a Motion to be Re-sentenced (R. 112) along with an accompanying Affidavit (R-113) and while that Motion was pending counsel filed the Petition for Extraordinary Relief under Rule 65B. (R-121) That Motion is also supported by the Affidavit of counsel (R-113). A copy *State v. Johnson*, 635 P.2d 36 also accompanied the Motion for Extraordinary Relief.

The Trial Court dismissed the Petition for Extraordinary Relief on the grounds that the issues had been adjudicated by the Court of Appeals, and gave no consideration to the fact that the Defendant was not at fault in the procedural defects of the case.

STATEMENT OF FACTS

The Statement of Facts in this appeal are basically set forth above in the Statement of the Case. To avoid being repetitive we refer to the Statement of the Case and the following brief supplement.

A copy of the Court of Appeal's Memorandum Decision is made a part of this Brief as Addendum No. 1.

The Petition for Extraordinary Relief (R-121) is made a part of this Brief as Addendum No. 2.

The Affidavit of Counsel (R-113) is made a part of this Brief as Addendum No.3.

Judge Baldwin's decision to dismiss as set forth in the transcript of the Hearing on Motion May 10, 2001 on Page 2 Lines 17 through 25 reads as follows:

> "I've read the rule. I've read the case. I'm dismissing the petition. I'm finding that the Court doesn't have to find pursuant to the rule, doesn't have to find facts or conclusions of law but I'm filing (sic) it has been adjudicated in the Court of Appeals, that I'm not taking further jurisdiction in the case and I'm imposing the sentence and Mr. Rees if you'll go with the bailiff and start spending your time. The imposition of the sentence is taking place right now."

ARGUMENT POINT I

THE TRIAL COURT ERRED IN NOT GIVING ANY CONSIDERATION TO THE DEFENDNT'S LACK OF FAULT IN A PROCEDURAL DEFECT OF THE APPEAL PROCESS

Rule 65B, coupled with the decision in *State v. Johnson*, 635 P.2d 36 (Utah 1981) Provides the means by which a defendant, who is not at fault, can petition the court to re-sentence him as a means of proceeding with the appeal process. This procedure is generally used when the defendant's counsel fails to

timely file a Notice of Appeal and the defendant looses jurisdiction due to no fault of his own.

State v. Rawlings, 829 P.2d 150, (Court of Appeal 1992) may even limit this procedure to a "first right of appeal" as is stated at page 154, as follows:

> "The State reads Johnson too narrowly. When resentencing Takes place to allow a first right of appeal, as set forth in Johnson, this should not rule out the procedural possibility that post-conviction motions may be appropriately heard in the sentencing court."

The problem in this case is that the defendant was without fault in not detecting a defect in the first appeal process. This raises the question of whether or not he has any remedy to be resentenced so that Points 1 and 2 of the original appeal may be decided on the merits.

The transcripts of the Preliminary Hearing and the Suppression Hearing were not forwarded to the Court of Appeal by the Clerk of the Court. The failure of the Clerk to forward the transcripts was not realized by the defendant's counsel until after the decision of the Court of Appeals was rendered. As the Defendant's trial counsel and counsel on appeal, I (the undersigned) should have discovered the problem. This was not the defendant's fault. This oversight was acknowledged in the Petition filed under Rule 65.

The Trial Court did not give any consideration as to whether or not the defendant was a fault. The Trial court simply said he would take no further jurisdiction because the matter had been adjudicated. (Hearing on Motion – May 10, 2001 Page2)

> "In all criminal prosecutions, an accused has a constitutional right to a timely appeal from his conviction. Utah Constitution,

Art. I, Sec.12: Weaver v. Kimball, 59 Utah 72, 202 P. 9 (1921) (State v Johnson, Supra at 37)

There was in fact a decision rendered by the Court of Appeals (Case No. 99-1078CA). The trial court considered this an adjudication. It was not an adjudication on the merits of Points 1 & 2 of the Appellate Brief.

CONCLUSION

The Appellant respectfully requests this court to remand this case back to the Trial Court with instructions to determine if the defendant was not at fault in the appeal process and if not at fault, to Order that the defendant be resentenced so that he can appeal for a determination on the merits of Points 1 & 2 of the original Appellant's Brief.

Dated this 21st day of November, 2001.

H. DON SHARP, ATTORNEY FOR APPELLANT

MAILING

I hereby certify that I mailed two copies of his brief to the Plaintiff – Appellee by U.S. Mail, prepaid, on this 21 day of November, 2001 by mailing them to:

Karen Klucznik
Deputy Attorney General
160 E 300 So. 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114

H. DON SHARP

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,

Plaintiff and Appellee,

v.

Troy Rees,

Defendant and Appellant.

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 991078-CA

F I L E D
(February 1, 2001)

2001 UT App 27

Second District, Ogden Department
The Honorable Parley R. Baldwin

Attorneys: H. Don Sharp, Ogden, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

---

Before Judges Jackson, Orme, and Thorne.

JACKSON, Associate Presiding Judge:

Rees first challenges the trial court's ruling on his motion to suppress evidence. The record shows the trial court relied on evidence presented in the preliminary hearing to decide the suppression issue. However, Rees failed to incorporate the preliminary hearing transcript, the suppression hearing transcript, and the affidavit in support of the search warrant into the record. A complete record is essential in this case because "issues presented in search and seizure cases are highly fact sensitive." State v. Lovegreen, 798 P.2d 767, 770 (Utah Ct. App. 1990). Because some transcripts were not included in the record, we are unable to review pertinent factual findings by the trial court in our evaluation of whether someone had the authority to consent to a search. "In the absence of an adequate record on appeal, we cannot address the issues raised and [we] presume the correctness of the disposition made by the trial court." State v. Rawlings, 829 P.2d 150, 152-53 (Utah Ct. App. 1992); see also Utah R. App. P. 11(e)(2).[1]

---

1. We note that Rees did not file a reply brief. The State's brief argues several procedural failures which Rees did not address in his opening brief. Absent a reply brief, the State's

(Continued on the next page.)

Next, Rees challenges the trial court's finding that he possessed marijuana with intent to distribute. To successfully challenge a trial court's factual finding, Rees must first marshal the evidence in support of the finding and then show why that evidence is legally insufficient to support the finding See Utah R. App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). Rees has failed to marshal the evidence, instead he only points to the evidence contrary to the trial court's ruling. See State v. Decorso, 1999 UT 57, ¶41, 993 P.2d 837. Thus, we affirm the trial court's finding. See id

Finally, Rees contends the trial court dismissed the case after witnesses for the State failed to appear at two scheduled preliminary hearings, and the trial court should not have allowed the State to refile charges without presenting new evidence. However, the record does not bear out Rees's assertions. First, the record does not show that the case was dismissed and charges were refiled Second, the record shows that the scheduled April 1, 1999 preliminary hearing was continued at Rees's request so that Judge Baldwin could hear the case. The April 8, 1999 preliminary hearing was also continued at Rees's request. Because Rees has failed to provide an adequate record to support his contentions on appeal, we presume the correctness of the trial court's rulings. See Rawlings, 829 P.2d at 152-53.

Affirmed.

Norman H. Jackson,
Associate Presiding Judge

WE CONCUR:

Gregory K. Orme, Judge

William A. Thorne, Jr., Judge

---

1. (..continued)
characterization of the record and the important nature of the omitted transcripts stands unchallenged.

H. DON SHARP, # 2922
Attorney for Defendant -Petitioner
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2491 Washington Blvd.
Ogden, Utah 84401
Tele: (801) 621-1567

DISTRICT COURT-STATE OF UTAH

WEBER COUNTY-OGDEN DEPARTMENT

STATE OF UTAH.	/	PETITION FOR EXTRAORDINARY RELIEF
Plaintiff/Respondent,	/	
Vs.	/	Case No. 991900480
TROY REES,	/	JUDGE: PARLEY BALDWIN
Defendant/Petitioner.	/	

COMES NOW, Troy Rees, the above named Defendant/Petitioner, by and through his attorney H. Don Sharp and hereby petitions this Court for Extraordinary Relief under the provisions of Rule 65B (a)(b).

The reason for requesting extraordinary relief is that the Defendant's appeal was denied for the failure of certain transcripts having not been filed with the Court of Appeals. These transcripts had been timely ordered, paid for and were on file with the Clerk of the District Court but were not filed with the rest of the record. This was through no fault of the Defendant/Petitioner, but the Defendant/Petitioner is restrained by the 45 day jail sentence pending if he is not granted the relief requested herein.

STATEMENT OF FACTS

1. The defendant was convicted of Possession of Marijuana with intent to Distribute (A third Degree Felony) and an accompanying Possession of Paraphernalia and Class B Misdemeanor and sentenced on the 2nd day of December, 1999.
2. Included in the sentence was a jail term of 45 days which was stayed pending appeal.
3. The appeal was timely filed and transcripts of all relevant proceedings (Preliminary Hearing, Suppression Hearing, and Trial) were ordered, paid for and filed with the Court.
4. Defendant's Appellant Brief was timely filed.
5. The State's Reply Brief was filed.
6. The State argued in its reply brief that appellate record (Preliminary Hearing and Suppression Hearing Transcripts) was not complete.
7. Defendant's counsel, upon receipt of the State's Brief glanced at the three Arguments set out on the Table of Contents page of the Brief and obviously did not pick up on the defect in the record.
8. The State did not inquire of Defendant's attorney as to the whereabouts of the Transcripts.
9. The Court of Appeals dismissed the Appeal on the insufficient record.
10. After receipt of the Court of Appeals decision defendant's counsel contacted Fran Lund, of the District Court Clerks office to see if the transcripts were on file. After she looked for them the transcripts of the Preliminary Hearing and

Suppression Hearing were located, but they had been filed on a different shelf than the rest of the record. She confirmed at that time that the transcripts had not been filed.

11. The defendant was unaware of the above problems in his appeal, and was not responsible for the dismissal.

12. There are important legal and factual issues that should be reviewed in this case and under the circumstances the defendant has been denied his right to appeal through no fault of his own.

13. The only remedy for this type of Problem is threw a Petition for Extraordinary Relief under Rule 65B of the Utah Rules of Civil Procedure. State v. Johnson, 635 P.2d 36 (1981)

WHEREFORE, Petitioner prays for relief as follows:

1. That the Court hold an evidentiary if necessary to determine if the Defendant has been denied his Constitutional right to appeal and that the denial was no fault of the Defendant/Petitioner.
2. Upon a finding of a denial of the right to appeal through no fault of the defendant to re-sentence the defendant and allow the appeal to be refiled.

Dated this 9th day of May, 2001

H. DON SHARP, ATTORNEY FOR PETITIONER

H. DON SHARP, # 2922
Attorney for Defendant
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2491 Washington Blvd.
Ogden, Utah 84401
Tele: (801) 621-1567

DISTRICT COURT-STATE OF UTAH

WEBER COUNTY-OGDEN DEPARTMENT

STATE OF UTAH,	/	AFFIDAVIT
Plaintiff,	/	
Vs.	/	Case No. 991900480
TROY REES,	/	JUDGE:
Defendant.	/	

Comes now H. Don Sharp and having been first duly sworn, deposes and says:

1. I am the attorney of record in the above entitled matter.
2. The appeal was timely filed and the brief was timely submitted.
3. The appeal was denied on the grounds that the transcripts of the Preliminary Hearing and the Suppression Hearing were not filed with the Appellate Court.
4. The Transcripts were prepared, paid for and filed with the District Court prior to the filing of the appeal.
5. Rule 11 (d) (1) of the Rules of Appellate procedure require the clerk of the court, in criminal cases, shall forward all papers that are a part of the case to the Court of Appeals.

6. The Transcripts of the Preliminary Hearing and the Suppression Hearing were located by Fran Lund after the File was returned to the District Court. The Transcripts that were not filed were in the Clerks office on a shelf but in a different location than the rest of the transcripts and were not filed.

7. That the issues raised in the appeal are extremely important the defendant and to the clarification of the laws of search and seizure in the State of Utah..

Dated this 12th day of April, 2001

H. DON SHARP

NOTARY

H. Don Sharp appeared before me on this 12th day of April, 2001 and having been first duly sworn signed this affidavit in my presence.

NOTARY

CYNTHIA E BRUNKER
NOTARY PUBLIC • STATE of UTAH
2491 WASHINGTON BLVD #200
OGDEN, UT 84401
COMM. EXP. 10-03-2004

Addendum G

STATEMENT OF THE FACTS IN THE UNDERLYING CRIMINAL CASE[9]

At approximately 8:30 a.m., on 7 August 1998, Deputy Barnett of the Weber County Sheriff's Office, and the Mayor of Farr West, Utah, went to property located at 1825 North 200 West in Farr West to discuss re-zoning the area with property owner David Hunt (R. 103:20-24). After unsuccessful attempts to find Hunt in a warehouse on the property, Deputy Barnett knocked on the door of a fifth wheel trailer which was parked nearby (R.103:23). A female voice said, "Come on in" (***id.***). After Deputy Barnett opened the door, the female inside repeated, "Come on in" (R. 103:24). Upon entering the trailer, Deputy Barnett immediately detected a strong odor of burnt marijuana (R. 103:26). The female, who appeared to be the sole occupant of the trailer, was wearing pajamas and was wrapped in a blanket (R. 103:25-26). The deputy observed that there were several food items and articles of clothing scattered around, and also that there was a bed and bedding in the nose of the trailer (***id.***).

After introducing himself, and without mentioning the burnt marijuana smell, Deputy Barnett asked if Hunt was around (R. 103:27). The woman identified herself as Doreen Atkin and said that Hunt was only at the property "off and on," and that if his truck was gone, he was not around (***id.***). She then looked outside and confirmed that Hunt's truck was not there (***id.***).

---

[9] These are the facts of the underlying criminal conviction, taken from the State's brief in the direct appeal (case no. 991078-CA). The facts are stated in the light most favorable to the bench verdict. See Johnson v. Higley, 1999 UT App 278, ¶2, 989 P.2d 61, 61 (bench trial).

Concluding that Hunt was not on the property, Deputy Barnett asked Atkin about the burnt marijuana smell inside the trailer (***id.***). Atkin told him that two other individuals had come into the trailer earlier to look for her boyfriend, defendant, and that they had been smoking a marijuana cigarette (R. 103:32). Atkin also said that the trailer belonged to defendant and that she stayed there overnight because her air conditioner was broken (R. 103.28).

Deputy Barnett asked Atkin for permission to search the trailer and Atkin consented saying, "Sure, go ahead. Take a look around" (R. 103:27-28). Deputy Barnett walked into the kitchen area, and looking into a garbage bag hanging from a cabinet, saw four marijuana stems (R. 103:29). Deputy Barnett asked Atkin if she had been smoking, which she denied and also stated that the marijuana stems belonged to the individuals that had been smoking marijuana in the trailer earlier (R. 103:32). Deputy Barnett asked if he could continue to search and Atkin replied: "Hey, yeah, please look around" (R. 103:32). Atkin also identified some bags as hers and invited the deputy to look inside them as well (***id.***). No contraband was located inside the bags (R. 103:33).

Deputy Barnett next looked inside a kitchen cabinet and found a small cookie tin containing loose marijuana, two marijuana pipes (including one that was filled with marijuana), two packages of rolling papers, several used plastic baggies, and two baggies still containing marijuana (R. 103:33-38). There was also a key ring with approximately four keys and a bank card bearing the name "Troy's Trucking" (R. 103:35-36). The total weight of the marijuana found in cupboard was 42 1 grams (R. 103 38).

At that point, Deputy Barnett told Atkin that he needed to find out who the marijuana belonged to and asked that she contact defendant (R. 103·40). Atkin called defendant on a cellular phone and Deputy Barnett told him that he needed to speak with him about the marijuana in his trailer (R. 103.41). Approximately 45 minutes later, defendant arrived at the trailer and was promptly given his ***Miranda*** rights, which he waived (R. 103.41-42).[10]

Following defendant's statement to Deputy Barnett, he was arrested and the trailer was seized and inventoried (R. 103:46-48).[11] During the inventory search, a locked safe was discovered inside one of the trailer's cabinets (R. 103:48).

Officer Jensen of the Weber-Morgan Narcotics Strike Force also arrived at this time and questioned defendant again following a second administration and waiver of ***Miranda*** rights (R. 103:46, 91-94). When Officer Jensen asked defendant if he ever shared his marijuana with his friends, defendant responded, "basically, . . . I mean if that's what you're getting at, I mean I don't know" (R. 103:99-100) Defendant admitted that he had sold marijuana "a long time ago," but also claimed that marijuana in his trailer was "just my stash" (R. 103:101). Defendant claimed that he stored the marijuana in different quantities "as he comes and goes" (R. 103:103, 108-09).

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[10]***Miranda v. Arizona***, 384 U.S. 436 (1965).

[11]Deputy Barnett's interview of defendant in the trailer was audio video recorded and was played for the trial court during the bench trial (R. 103·42-45). The video was not included in the record on appeal; however, the State's Objection to the motion to suppress indicates that during the interview defendant told Deputy Barnett, among other things, that the marijuana belonged to him, and that his friends and coworkers "abuse his stash" (R 69).

Based on defendant's statements to Deputy Barnett and Officer Jensen, as well as additional information that defendant had a history of drug crimes, Agent Burnett, also with the strike force, obtained a search warrant for the safe (R. 103:115-116) (a copy of the affidavit in support of the search warrant was not included in the record on appeal). Two baggies containing approximately 85.8 grams of marijuana were seized (R. 103:116, 119). In Agent Burnett's experience this amount was "too large" for merely personal use (R. 103:123-24). Indeed, "an ounce is probably the average amount . . . This is four or five times that amount" (*id.*). Additionally, defendant's manner of storing the marijuana in separate baggies and locations was also inconsistent with his claim of personal use (R. 103:124-125). Finally, a recreational user typically uses marijuana only one to three times per week, and the average pipe bowl only holds approximately one gram of marijuana, while a rolled joint holds "a little less depending on how big they want to roll it" (R. 103:126). Thus, defendant's approximate 129 grams of marijuana could be made into at least as many joints (R. 103:126-127, 148). It would take the average marijuana user a little less than two years to consume this amount (R. 103:127).

Addendum H

Only the Westlaw citation is currently available

UNPUBLISHED OPINION CHECK COURT RULES BEFORE CITING

Court of Appeals of Utah

Daniel **SHUNK,** Petitioner,
v
Honorable Dennis **FUCHS,** Respondent
Daniel **SHUNK,** Petitioner,
v
Honorable William BARRETT, Respondent

Nos. 20000192-CA, 20000193-CA.

May 4, 2000

Daniel Shunk, Sheridan, OR, pro se

Brent M Johnson, Salt Lake City, for respondents

Before BENCH, BILLINGS, and DAVIS, JJ

MEMORANDUM DECISION (Not for Official Publication)

PER CURIAM

*1 Petitioner seeks extraordinary relief from this court under Utah Rule of Civil Procedure 65B in the form of a writ directing the district court to act on a petition for habeas corpus filed in the district court For the reasons set forth below, we deny the petition for extraordinary relief

A petition for extraordinary relief directed to a district court judge is governed by Rule 65B(d) of the Utah Rules of Civil Procedure and Rule 19 of the Utah Rules of Appellate Procedure Rule 19 requires that a petition contain a statement of all persons whose interests might be substantially affected, a statement of the issues presented and of the relief sought, a statement of the facts necessary to an understanding of the issues presented, a statement of the reasons why no other plain, speedy or adequate remedy exists and why the relief should be granted, and copies of any order or other parts of the record which may be essential to an understanding of the matters set forth in the petition Utah R App P 19(b) Petitioner has failed to comply with these requirements In particular, he has not identified all affected parties, stated the facts relevant to the relief he seeks, stated why no other plain, speedy or adequate remedy exists, or provided copies of necessary documents

Further, Rule 65B(d) authorizes relief only where a court "has exceeded its jurisdiction or abused its discretion," or "failed to perform an act required by law " Utah R Civ P 65B(d)(2)(A) "Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority " Utah R Civ P 65B(d)(4) Petitioner fails to demonstrate how the trial court abused its discretion or failed to perform an act required by law While Utah Rule of Civil Procedure 65C directs a district court to determine whether a writ is subject to summary dismissal or whether it warrants a response, the rule does not set a time limit for such action Moreover, it is not clear whether the district court was even aware of the petition, as it was filed in the underlying criminal case rather than in a separate civil action, as required by Rule 65C Petitioner must file a notice to submit or other triggering document to obtain respondent's consideration of his petition

Finally, extraordinary relief may only be granted "where no other plain, speedy and adequate remedy is available " Utah R Civ P 65B(a), Utah R App P 19(b)(4) Petitioner has an adequate remedy in the trial court for the relief he seeks Petitioner may move the district court to dismiss the charges pending against him and properly serve the motion on the State Petitioner must actively pursue the proper procedure in the district court before seeking relief from this court

2000 WL 33250566 (Utah App)

END OF DOCUMENT